NO. 72516-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JIMI HAMILTON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Marybeth Dingledy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1a. The shocking misconduct of the Department of Corrections (DOC) offends the fundamental sense of fairness and is so outrageous that due process bars this prosecution.

1b. The trial court erred in not dismissing this prosecution in light of a DOC officer's intrusion on attorney-client communications and subsequent tampering with video tape evidence to conceal it, DOC's refusal to provide Jimi James Hamilton a confidential space to meet with his attorneys, and DOC's refusal to adhere to the trial court's orders designed to remedy further DOC intrusions on attorney-client communications.

1c. In its narrative conclusions of law issued September 24, 2013, the trial court refused to presume prejudice based on the DOC's misconduct because Hamilton could not demonstrate that the fruits of DOC's misconduct were communicated to the prosecutor. CP 603-04. This was error because the State bore the burden to prove the absence of prejudice beyond a reasonable doubt.

1d. The trial court erred in denying Hamilton's motion to reconsider the September 24, 2013 order denying dismissal, which requested that the court properly place the burden on the State to prove the absence of prejudice beyond a reasonable doubt. CP 435.

1e. The trial court erred in entering finding of fact 59 in its November 3, 2014 order denying Hamilton's motion to dismiss, which stated that the placement of Hamilton and his attorneys in a no-contact room was justified by the need for safety and security and that the inability to exchange documents did not damage the attorney-client relationship or otherwise prejudice Hamilton. CP 16.

1f. The trial court erred in entering conclusion of law 1 "related to all allegations" in its November 3, 2014 order that any intrusions into Hamilton's private affairs were necessary and justified by legitimate security concerns. CP 21.

1g. The trial court erred in entering conclusion of law 2 "related to all allegations" in its November 3, 2014 order that Hamilton had not shown arbitrary action or government misconduct. CP 21.

1h. The trial court erred in entering conclusion of law 1 in its November 3, 2014 order that DOC's intrusions do not rise to the level of violating Hamilton's rights to counsel and a fair trial and do not warrant dismissal. CP 22.

1i. The trial court erred in entering conclusion of law 2 in its November 3, 2014 order that DOC's intrusions were justified by legitimate general security concerns. CP 22.

1j. The trial court erred in entering conclusion of law 3 in its November 3, 2014 order that DOC's actions did not prejudice Hamilton's right to a fair trial beyond a reasonable doubt. CP 23.

1k. The trial court erred in entering conclusion of law 4 in its November 3, 2014 order denying the motion to dismiss. CP 23.

1*l*. The trial court erred by wholly failing to remedy DOC's misconduct.

2. In this Persistent Offender Accountability Act (POAA) case, the trial court erred in refusing to grant a mistrial or instruct the jury that Hamilton faced a life sentence without the possibility of parole after a venireperson informed all jurors he had only received a 72-day work release sentence for second degree assault, the very charge Hamilton faced.

3a. The trial court erred in permitting the prosecutor to "impeach" defense expert Stuart Grassian, M.D. with prison records containing the opinions and conclusions of nontestifying experts Grassian did not rely upon in formulating his opinion on diminished capacity.

3b. The trial court erred in permitting the prosecutor to read inadmissible hearsay into evidence during her cross examination of Grassian.

3c. The trial court erred in instructing the jury that statements attributed to Hamilton in the prison records could be considered for the truth of the matter asserted because the statements were double hearsay and were

introduced for the limited purpose of expert opinion, not as substantive evidence.

3d. The trial court erred in permitting the prosecutor to read inadmissible propensity evidence into evidence during cross examination of Grassian and also erred by failing to engage in any aspect of the appropriate ER 404(b) analysis.

3e. To the extent that defense counsel's and Hamilton's objections to the prosecutor's impermissible use of prison records did not preserve the errors for appellate review, defense counsel was ineffective.

3f. The improper introduction of inadmissible prison records during the cross examination of Grassian deprived Hamilton of a fair trial.

4a. The prosecutor committed misconduct during her cross examination of Hamilton by commenting on the veracity of Hamilton and defense expert Stuart Grassian, M.D.

4b. The prosecutor committed misconduct during her closing argument by disparaging the defense.

4c. Defense counsel was ineffective for failing to object to prosecutorial misconduct during closing argument.

4d. The cumulative effect of prosecutorial misconduct deprived Hamilton of a fair trial.

5. The reasonable doubt instruction given by the trial court required jurors to have more than a reasonable doubt to acquit and shifted the burden to Hamilton to provide jurors with a reason for acquittal. This reasonable doubt instruction is constitutionally defective.

6. Cumulative error deprived Hamilton of a fair trial.

7. The trial court violated Hamilton's right to have a jury determine all the facts necessary to support a sentence of life without the possibility of release under the POAA.

Issues Pertaining to Assignments of Error

1a. A corrections officer entered Hamilton's cell and read his legal materials for 25 to 30 minutes. He or another DOC officer then tampered with video evidence showing him entering and exiting the cell. DOC also refused to provide Hamilton and his counsel a confidential meeting space despite their request. The trial court issued an order requiring DOC to provide a confidential meeting space for Hamilton and his lawyers, but the DOC refused to comply. Was DOC's misconduct so egregious that it shocks the fundamental sense of fairness and bars this prosecution as a matter of due process of law?

1b. Based on the conduct described in the immediately preceding issue statement, did the trial court err in not dismissing this prosecution?

1c. Given that the State bears the burden of proving the absence of prejudice beyond a reasonable doubt, did the trial court apply the incorrect standard by requiring Hamilton to prove that DOC shared the fruits of its misconduct with the prosecutor before it would presume prejudice?

1d. In light of the standard stated in the immediately preceding issue statement, did the trial court err in denying Hamilton's motion for reconsideration, which urged the correct standard?

1e-j. In light of the trial court's order mandating a confidential meeting space where Hamilton and his attorneys could exchange documents, which the DOC failed to heed, did the trial court err by concluding that a no-contact room was justified by security concerns and that Hamilton had not shown an intrusion into his private affairs, government misconduct, or intrusions that rise to the level of violating Hamilton's rights to counsel and a fair trial?

1k-*l*. Did the trial court err by denying the motion to dismiss or in failing to remedy any of DOC's misconduct?

2. Did the trial court's refusal to grant a mistrial or instruct the jury that Hamilton faced a life sentence in the face of a venireperson's statement that he received an extremely light punishment for the same crime deprive Hamilton of a fair trial?

3a. Did the trial court err in permitting the State's attempt to impeach defense expert Grassian with the unrelied upon conclusions and opinions of nontestifying treatment providers?

3b. Did the trial court err by allowing the prosecutor to read into evidence inadmissible hearsay contained in prison records during her cross examination of Grassian?

3c. Did the trial court err by instructing the jury it could consider statements attributed to Hamilton in the prison records for the truth of the matter asserted?

3d. Did the trial court err when it permitted the prosecutor to use inadmissible propensity evidence during cross examination of Grassian and by failing to engage in any aspect of the required ER 404(b) analysis?

3e. To the extent that defense counsel did not object to each and every instance of the State's improper use of the prison records during its cross examination of Grassian, did defense counsel render ineffective assistance?

3f. Did the improper introduction of prison records during the cross examination of Grassian deprive Hamilton of a fair trial?

4a. Did the prosecutor's impermissible comments on Hamilton's and Grassian's veracity during her cross examination of Hamilton deprive Hamilton a fair trial?

4b. Did the prosecutor's improper disparagement of defense counsel, Hamilton, and Grassian deprive Hamilton of a fair trial?

4c. Did defense counsel render ineffective assistance when they failed to object to the prosecutor's disparagement of the defense during closing argument, and, if so, did the ineffective assistance render Hamilton's trial unfair, requiring reversal of Hamilton's conviction and remand for retrial?

4d. Does the cumulative effect of prosecutorial misconduct, if each instance of misconduct does not itself warrant reversal, require reversal?

5a. Did the reasonable doubt instruction stating a "reasonable doubt is one for which a reason exists" tell jurors that they must have more than just a reasonable doubt to acquit?

5b. Did the reasonable doubt instruction undermine the presumption of innocence and impermissibly shift the burden of proof by telling jurors they must be able to articulate a reason to have a reasonable doubt?

5c. Does erroneously instructing a jury regarding the meaning of reasonable doubt vitiate the jury-trial right, constituting structural error?

6. Does the cumulative effect of the assigned errors, if the errors do not each themselves warrant reversal, require reversal?

7. Under current state and federal law, a judge rather than a jury may find the fact of a prior conviction, but the POAA requires a factual finding of a series of temporal relationships between the prior convictions, the underlying prior offenses, and the conviction/offense being punished by life imprisonment without the possibility of release. In imposing a life sentence in this case, did the trial court violate Hamilton's federal and state constitutional rights to have a jury determine all the facts necessary to find he was a "persistent offender" under the POAA?

B. STATEMENT OF THE CASE

1. Charges and factual background

The State charged Hamilton with second degree assault of Nicholas Trout, a correctional officer in the Monroe Correctional Complex. CP 790. The alleged assault occurred in the morning of August 23, 2012. CP 790.

According to witnesses, Hamilton was speaking adamantly with Trout. 20RP[1] 97-98, 159; 21RP 9; 22RP 189, 195. Trout told Hamilton to

[1] Hamilton's briefing will refer to the verbatim reports of proceedings as follows: 1RP—August 7, 2013; 2RP—three-volume consecutively paginated transcripts dated August 22, 23, and 26, 2013; 3RP—September 24, 2013; 4RP—December 4, 2013; 5RP—December 11, 2013; 6RP—December 20, 2013; 7RP—January 2, 2014; 8RP—January 8 and 21, 2014; 9RP—April 1, 2014; 10RP—May 15, 2014; 11RP—June 16, 2014; 12RP—June 17, 2014; 13RP—two-volume consecutively paginated transcripts dated June 19, 2014; 14RP—August 11, 2014; 15RP—August 12, 2014; 16RP—August 19, 2014; 17RP—September 12, 2014; 18RP—September 15, 2014; 19RP—September 16, 2014; 20RP—September 17, 2014; 21RP—September 18, 2014; 22RP—September 19, 2014; 23RP—September 22, 2014; 24RP—September 23, 2014; 25RP—two-volume consecutively paginated transcripts dated September 24, 2014; 26RP—September 25, 2014; 27RP—September 29, 2014; 28RP—September 30, 2014; 29RP—October 1, 2014; 30RP—October 2, 2014; and 31RP—November 3, 2014.

"yard in," a prison term instructing an inmate to return to his cell. 20RP 160; 21RP 9; 22RP 189, 195. Then Hamilton suddenly ran back toward Trout and punched him; Trout immediately lost consciousness. 20RP 161; 21RP 9; 22RP 190. Hamilton stood over Trout, repeatedly punching him in the face with alternating fists. 19RP 109, 111-12; 20RP 98, 160-61; 22RP 114-15. Trout's cheeks and eyes were both swollen, and his cheek bones and jaw were fractured on both sides. 21RP 192-93, 196-97; 22RP 15-17, 108.

Corrections officer Daniel Cowles was first to respond, activated the emergency alarm, and yelled, "'Stop, Hamilton. Jimi, stop.'" 19RP 112, 116, 144; 20RP 161. Hamilton stopped. 19RP 112. Cowles described Hamilton "looking at Trout with a deep wide-eyed stare." 19RP 146, 150. Cowles ordered the unit to "yard in" and Hamilton complied. 19RP 113, 145-46; 20RP 161. The security footage showed four angles of the incident. 19RP 123; 20RP 6-7.

Earlier that day, Hamilton had filed emergency grievances regarding retaliation against him and breaching his confidentiality with regard to filing a Prison Rape Elimination Act[2] complaint that disclosed a sexual relationship occurring between one of the prison's mental health providers, Wendy Lee, and another inmate. 20RP 26-28, 34, 65-66, 74-75; 21RP 26, 117-18, 143, 145; 22RP 118; 24RP 106-08. Corrections officer Alexandr

[2] Prison Rape Elimination Act of 2003, Pub. L. 108-79, 117 Stat. 972 (codified at 42 U.S.C. §§ 15601 to 15609 (Sept. 4, 2003)).

Kozlovskiy told Hamilton "that he was stalking counselors, basically being nearby the counselor's office all the time" and told Hamilton to stop. 22RP 75-76, 89, 93. Kozlovskiy apparently learned this information from Trout. 22RP 75. Hamilton filed emergency grievances because it "was reported to [him] by a confidential staff source that [mental health unit supervisor] Deb Franek told Ms. Lee that I made allegations."[3] 20RP 34; 21RP 115-16, 143.

Also on August 23, 2012, Hamilton was supposed to find out whether he was going to be transferred out of the special offender unit, a mental health unit, into the general prison population. 20RP 42-43, 63-64; 21RP 110-11. Hamilton asked multiple times on the morning of August 23, 2012 what the status of his transfer was, appearing upset about it. 20RP 47-48, 141, 144; 21RP 7, 24-25, 111-14.

Hamilton had also made telephone calls to his wife during which he called Trout a "dip shit" who "won't let a mother fucker do anything." 24RP 193-94. Trout kept the doors to the unit closed that morning, so Hamilton could not leave to seek further information regarding his grievances or potential transfer. 20RP 159; 22RP 188, 195.

After the incident while back in his cell, Hamilton told corrections officer Jonathan Johnson that he snapped. 22RP 24. Hamilton was willing to submit to restraints and indicated he would not cause any problem,

[3] When Hamilton asked Franek directly about whether or not she had disclosed his allegations to Lee, Franek responded, "Jimi, staff must share information." 21RP 143.

seeming calm. 22RP 24, 31, 42. Hamilton was taken to the infirmary due to injuries to his hand. 22RP 24, 44. As he was being escorted through the yard, Hamilton yelled to Franek, "you'll have to listen to me now" or "It's too late." 21RP 120; 22RP 45.

2. Diminished capacity defense

Hamilton's defense was diminished capacity. Given his significant time in segregation, or solitary confinement, in prison, Hamilton was paranoid and had significant mental health issues. 22RP 151-52, 159. Hamilton has only spent a year and a half altogether outside of prison since the age of 11. 23RP 75; 24RP 139-45, 151.

In segregation, inmates are permitted outside their cells for an hour of yard time and a shower only five days per week. 22RP 28-29; 23RP 57. Defense expert Stuart Grassian, M.D. testified solitary confinement consistently leads to several serious mental health issues: "difficulties with thinking, concentration, memory, very often go into dissociative states." 23RP 64. Grassian noted many people who have been exposed to solitary confinement "even lose track of where they are. There's very commonly an amnesia for the events that took place during those periods of time. They have perceptual distortions and hallucinations." 23RP 64. In addition, suicidality is a major concern of placing inmates in segregation. 23RP 72.

Hamilton explained to jurors his visual and auditory hallucinations immediately before the alleged assault on Trout. Hamilton described getting "this eerie feeling" that he was about to be attacked. 24RP 130. In response, he "turned back and r[a]n." 24RP 130. Hamilton explained he perceived the presence of another white supremacist inmate, James Curis, and perceived he was armed with a knife. 24RP 128-31. As this was happening, Hamilton lacked any plan, but felt the instinct to run towards the door for his own safety because he feared getting stabbed. 24RP 133. Experiencing an auditory hallucination, Hamilton heard Curtis say, "I'm going to get him out now," which Hamilton interpreted as he "was going to be stabbed." 24RP 133. Hamilton recalled running and then colliding with Curtis, but then his mind went blank. 24RP 131-32.

Hamilton described experiencing hallucinations on three prior occasions. 24RP 160. He had heard "the voice of God telling me I needed to be punished." 24RP 160. On all three occasions, Hamilton engaged in self harm behaviors, cutting himself, attempting to hang himself, or overdosing on medication. 24RP 160.

Grassian confirmed Hamilton suffered from significant mental health issues as a result of spending long stretches of time in solitary confinement. 23RP 57, 64-66, 68-69, 76-77, 89-90, 94-99, 105-06. Based on Hamilton's history of mental illness and his observations, Grassian concluded Hamilton

was experiencing a dissociative episode, as he had in the past, at the time of the alleged assault. 23RP 105-06. Grassian described his conclusion as "mak[ing] perfect sense, it's perfectly consistent with what I know as a psychiatrist." 23RP 106. Grassian also stated, "The alternative, that he actually intended to do harm to a corrections officer just really doesn't make a lot of sense psychologically." 23RP 106.

3. Motions to dismiss based on DOC's misconduct

a. 2013 motion

Prior to trial Hamilton brought a motion to dismiss based on government misconduct citing State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963). CP 669-88. Hamilton made two primary claims.

First, Hamilton argued DOC failed to provide an adequate confidential meeting space in which Hamilton and his defense team could freely pass documents among themselves. CP 670-73. Despite the attorneys' requests for such a space, and the DOC's assurance to provide one, on May 7, 2013 DOC personnel informed the defense team that no confidential meeting space was available. CP 671-72, 690, 694-95. The resulting meeting took place in a no-contact room; several DOC employees were in earshot and the room had video and audio recording capabilities. CP 672, 690-91, 694-95; 2RP 190-91, 362, 383-84, 469, 555-56. In addition, because it was family visiting day, Hamilton and his team had to speak

loudly in order to hear each other through the Plexiglas that divided them. CP 672-73, 691, 695-96; 2RP 202, 365-66, 418, 417, 433, 557.

Because they could not pass documents to each other, defense counsel handed two sets of documents to a DOC employee who was set to deliver the documents to Hamilton on the other side of the room. CP 672, 691-92, 696; 2RP 367, 378, 398-400, 559-60. This employee was gone for approximately 10 minutes after being given the documents and thereafter only delivered one set of them, explaining the other set would have to be sent through the United States mail. CP 672-73, 692; 2RP 400, 405, 407, 425-27. The only explanation for the disparity in the treatment of these sets of documents is that DOC personnel had read the privileged and confidential attorney-client communications within them. CP 673.

The second part of Hamilton's motion concerned a May 19, 2013 search of Hamilton's cell, including Hamilton's legal materials. CP 673-78. Corrections officer Shannon Reeder entered Hamilton's cell for 25 to 30 minutes. CP 673-74, 702, 707, 713; 2RP 26, 47, 79, 84, 128, 162, 487-88; 14RP 75. Corrections officers are given wide authority to search inmate materials for contraband, but routine searches typically take five minutes. CP 674, 706-07, 712, 718-19. Witnesses indicated Reeder appeared to be closely reading Hamilton's legal materials. CP 674, 677, 702, 707, 713, 719; 2RP 86-87, 117, 162-63, 168-69, 172, 175. After 25 to 30 minutes of

Reeder's reading had elapsed, one inmate shouted, "'Get the fuck out of the cell and take me to yard.'" CP 677, 702, 707, 713, 719. As Reeder left Hamilton's cell, he said something to the effect of, "I was in there trying to learn how someone can sucker punch a CO and say they didn't form the intent." CP 677, 702, 707, 713, 719; 2RP 34-35, 89, 118, 165.

The trial court held a three-day hearing based on the motion to dismiss during which several inmates and DOC personnel testified. 2RP 1-628. Reeder was among the witnesses. 2RP 222-309. Reeder said the cell search was a random search for contraband. 2RP 228, 263. He stated he found two items of contraband, a flat piece of metal from a legal envelope and an extra pen. 2RP 228-29. Reeder took both items and put them in his pocket, which he acknowledged was unusual. 2RP 229, 272. Reeder also acknowledged finding some staples among Hamilton's legal materials but his search was not sufficiently thorough to find several others. 2RP 205-06, 278-79. Reeder claimed he occasionally will search longer than 20 minutes, noting the more I find, the further I have to go." 2RP 247. He acknowledged, however, that searches typically take five minutes. 2RP 257.

Reeder also discussed watching a video clip of him entering and leaving the cell, but noted he did not "remember specifically" whether he had seen a clear shot of him going into the cell. 2RP 263, 285-86. Reeder stated he only reviewed one of the angles that video recorded because he did

not know there was a second recording from a different angle. 2RP 287. Legal liaison Yvette Stubbs stated the prison videos were jumpy; she denied tampering with the video. 2RP 460. During her closing argument, defense counsel noted the video "Reeder sees and [Stubbs] thinks that they provide us, the only one that they think that there is and that they provide to us doesn't show" Reeder entering and exiting the cell, but that the second regarding from a different angle shows both events. 2RP 594-95.

At the conclusion of the hearing, but before ruling on the motion to dismiss, the trial court issued two orders. Supp. CP ___ (Sub Nos. 70 & 71). One of the orders instructed DOC personnel not to read or scan Hamilton's legal correspondence "provided that the document bears an appropriate return address, is properly marked as legal mail, and it is signed by members of Mr. Hamilton's defense team UNLESS there is a specific reason to believe the document contains nonlegal communications." Supp. CP ___ (Sub No. 71); 2RP 626. The other order required that DOC provide Hamilton and his defense team a confidential meeting space where "no DOC staff are within hearing distance" and "where Mr. Hamilton may receive and return legal documents directly from and to counsel." Supp. CP ___ (Sub No. 70); 2RP 626-27. This order also allowed counsel to give "legal material to Mr. Hamilton during these visits" and instructed that DOC "may

check for contraband, but not read the documents." Supp. CP ___ (Sub No. 70); 2RP 627.

In its written order issued September 24, 2013, the court recited facts generally conforming to the foregoing recitation. CP 596-98. The trial court took care to note,

> A video documenting CO Reeder walking towards Mr. Hamilton's cell, and later leaving the cell, was provided to Defense Counsel. The video has two camera shots, each of which shows a different angle of CO Reeder approaching and leaving Mr. Hamilton's cell. One of the videos shows CO Reeder entering and leaving the area of Mr. Hamilton's cell. The other video speeds up at the exact times CO Reeder comes into the frames as he enters and leaves the cell.

CP 597.

In its conclusions, the trial court determined the DOC's "policy to place inmates and their counsel in the visitor's room for confidential meetings, despite the alternative and more appropriate classroom," was misconduct. CP 599. The court also determined it was misconduct to use DOC employees as document couriers rather than allowing inmates to freely exchange documents with their attorneys. CP 599. In addition, the trial court stated it was misconduct for DOC to read or scan legal mail "enough to make comments about the content. As this court found by virtue of its issued order, 'scanning' confidential legal mail is inappropriate." CP 600.

As for Reeder's cell search, the court did

> not find CO Reeder's testimony that he did not read Mr. Hamilton's legal material to be credible. It is undisputed that CO Reeder went through Mr. Hamilton's legal box in search of contraband. However, a thorough search of 25-30 minutes should have revealed the additional staples and clips . . . which CO Reeder apparently missed . . . .

CP 601. In addition, the court concluded,

> While the first camera angle suspiciously skips at the exact points of CO Reeder's entry and egress, the second camera angle lacks this phenomenon and confirms the time of his actions. Testimony suggests that Reeder was only aware of the first camera angle. CO Reeder's conduct and the possible collusion with other DOC employees in tampering with the videotape, suggest government misconduct both voluntary and dishonest.

CP 601. The court did not dismiss, however.

The trial court stated, "While CO Reeder's cell search taken together with the apparent videotape tampering is certainly both shocking and unpardonable, suppression of the evidence at Defendant Hamilton's trial can eliminate any prejudice it could cause." CP 603. The trial court declined to presume prejudice, despite finding shocking and unpardonable conduct, because "there is no evidence that the prosecution has actually obtained any information relating to Defendant Hamilton's case that it would use to prejudice the fairness of his trial." CP 603-04. In so ruling, the trial court placed the burden on Hamilton to demonstrate prejudice resulting from DOC's intrusions.

Following the issuance of State v. Peña Fuentes, 179 Wn.2d 808, 318 P.3d 257 (2014), Hamilton moved for reconsideration of the motion to dismiss, asserting the trial court misplaced the burden on Hamilton and the State was required to prove the absence of prejudice beyond a reasonable doubt. CP 517-25. The trial court denied this motion. CP 435.

b. 2014 motion

On March 21, 2014, Hamilton filed a second motion to dismiss based on Cory and CrR 8.3. CP 344-68.[4] Hamilton raised several issues in this motion but only one is relevant here.

During an attorney visit on March 12, 2014, Hamilton and his attorneys were again placed in a no-contact room where they could not exchange documents. CP 13, 346, 384-85; 11RP 29-30; 13RP 115, 129; 14RP 43. This room was also equipped for video recording but not for audio recording. CP 13; 11RP 102-03; 13RP 29-30, 117, 173. Hamilton had provided DOC personnel with a copy of the trial court order requiring the provision of a contact room. CP 14, 346, 384; 11RP 31, 35, 101; 13RP 116. However, DOC personnel told Hamilton this was not allowed and repeated this position to defense counsel at the time of the visit. CP 14, 346, 385; 13RP 115-16, 123-24, 141; 14RP 57-58. Defense counsel gave a DOC employee a copy of the order and asked him to contact the attorney general's

[4] This motion, without attachments, was 13 pages. Due to an apparent filing error, pages 2 through 13 are duplicated in the motion. Compare CP 345-56 with CP 357-68.

office. CP 14, 385; 11RP 32; 13RP 116. He did not do so, but forwarded the documents to a legal assistant for advice; this legal assistant told him not to comply with the court order. 13RP 77-78, 119, 128-29, 146, 153-55. Defense counsel was then escorted out of the facility 15 minutes before the scheduled end of the meeting without further explanation. CP 14, 385; 11RP 32; 13RP 132.

Hamilton argued the trial court should dismiss based in part on DOC's noncompliance with court orders. CP 347, 354-55. At multiple days of hearings on the motion to dismiss, several DOC witnesses stated they knew of the orders but chose not to follow them. 11RP 101; 13RP 115, 123-24, 153-55, 175.

In its oral ruling on the motion to dismiss, the trial court expressed its ire that DOC "violated my orders and apparently had a legal assistant who didn't even go to college advising the custody unit supervisor about whether to follow my order[.]" 16RP 98. The trial court also expressed outrage that "it is affecting a person who has a right to a trial and a right to have his attorneys present. If the [DOC] and the AG's office do not like my orders, they have a remedy, which is to note a hearing and contest it, not to ignore it." 16RP 98. The trial court determined this was a purposeful intrusion. 16RP 99; see also CP 16 ("The Court does find that requiring the defendant

to meet with his attorneys on March 12, 2014 in the no-contact room . . . was a purposeful intrusion into the attorney-client relationship.").

Nonetheless, the court did not dismiss. 16RP 99; CP 16. In findings drafted by the prosecutor, the court determined the level of intrusion was "justified by the need for safety and security of the inmate, staff and the public, including the defendant's attorneys and investigator." CP 16. The court further indicated, "The inability to pass documents back and forth on this one occasion cannot be found to have damaged the attorney-client relationship or otherwise prejudiced the defendant." CP 16. The trial court concluded the intrusion did not violate Hamilton's constitutional rights and found, beyond a reasonable doubt, that the intrusion did not prejudice Hamilton's right to a fair trial. CP 22-23.

c. Proposed alternative remedies regarding Reeder's cell search

Defense counsel proposed alternative remedies related to Reeder's cell search. Supp. CP ___ (Sub No. 214); 17RP 39-44, 48-50. Defense counsel proposed (1) prohibiting DOC trial witnesses from testifying about Hamilton's ability to form intent; (2) excluding all video evidence in the case, including the DOC video of the alleged assault of Trout; and (3) in the event the video evidence was admitted, disclosing to the jury the court's finding that DOC had tampered with other video evidence. Supp. CP ___

(Sub No. 214); 17RP 39-42. The court refused to provide any remedy related to Reeder's cell search. 17RP 51-52.

4. Juror 18 misleads the venire into believing a sentence for second degree assault was short and imposed on an individualized basis

During voir dire, Juror 18 stated he had been convicted of second degree assault, the same crime for which Hamilton stood trial. 18RP 112; CP 790. Juror 18 pleaded guilty and was sentenced to 72 days of work release. 18RP 112. He also denied that there was anything about the process he felt was unfair and simply that he "did [his] time." 18RP 112.

Defense counsel moved for a mistrial based on Juror 18's remarks, stating, "it gives me serious concern that the jury is going to misunderstand the gravity of the situation that we find ourselves in today, and the very real jeopardy that Mr. Hamilton is in. For that reason I think the jury has been tainted." 18RP 176. The trial court refused to grant a mistrial but indicated it would "instruct [the jury] at the time they're sworn in or perhaps tomorrow morning. I just don't know if you want me to call more attention to it or just to ignore it." 18RP 177.

The following day, defense counsel filed pleadings to memorialize its motion for mistrial and alternatively proposed the trial court instruct the jury, "If Mr. Hamilton is convicted of this charge, the Court will have no discretion and the only possible sentence is life in prison without the

possibility of parole." CP 134-37; 19RP 4. The trial court indicated, "At this point I'm not inclined to give that instruction, but I will see if there's another one that I might come up with." 19RP 6.

The trial court ultimately did nothing aside from giving the standard instruction: "You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful." CP 50.

5. Prison medical records used by the State to "impeach" the defense expert

During its cross examination of defense expert Stuart Grassian, M.D., a psychiatrist, the prosecutor read into evidence numerous prison medical records in an attempt to impeach Grassian's opinion on diminished capacity. 23RP 162-90; 25RP 87-141. These records contained various statements attributed to Hamilton. Many of them purported to record Hamilton's alleged unlawful and harmful behaviors in adult and juvenile prisons, contained a diagnosis of antisocial personality disorder, and indicated Hamilton had feigned mental illness, including suicide attempts, to manipulate treatment providers.[5]

[5] A bulleted list highlighting the prosecutor's use of these records and their specific contents is set out in the beginning of section D.4 infra.

Prior to trial, the defense moved in limine to exclude Hamilton's "prior prison/jail misconduct" under ER 401, ER 403, and ER 404. CP 215-17. The trial court granted the motion, instructing the prosecutor, "if you think that you need to go into any cross examination or some other fashion, please bring it up outside the presence of the jury so I have a better idea of what specifically we're discussing." 16RP 33. When the prosecutor began cross-examining Grassian, she never discussed the introduction of Hamilton's alleged prior prison misconduct contained in the medical records. 23RP 162.

Well into the cross examination of Grassian, the prosecutor stated she was using these records to impeach Grassian's opinion with matters he "should have considered" or "chose to ignore" in rendering his diagnoses and opinion on diminished capacity. 25RP 10, 165. Grassian had reviewed these records as part of Hamilton's medical file, but had not relied on them, or the conclusions or opinions contained in them, when formulating his opinion. In fact, Grassian was extremely critical of the DOC records and their contents, and was argumentative with the prosecutor regarding the records' quality and reliability. 23RP 47-48, 169, 176, 183, 186, 189-90; 25RP 88-89, 92-93, 108, 111, 124-26, 128, 143.

During the course of the prosecution's cross examination of Grassian, defense counsel lodged various objections to the manner of

examination and the use of material in the records. 23RP 180-81, 184, 189; 25RP 6, 18-19, 89-90, 103-05, 115, 118-19, 122, 129, 131-32, 157.

Defense counsel also asked the court to give a limiting instruction that the statements in the records were not being offered for the truth of the matter asserted, but for the purpose of diagnosis and opinion. 25RP 103-04. Instead, the trial court instructed the jury that Hamilton's statements in the records were not hearsay: "Any statements made by Mr. Hamilton can be considered for the truth of the matter asserted." 25RP 105.

The trial court also gave Hamilton an opportunity to object, and he did so on numerous grounds. 25RP 160-61, 166-67. The trial court indicated it understood Hamilton's position, but did not address the substance of his objections and permitted the "impeachment" of Grassian to continue without limitation. 25RP 168.

6. Prosecutorial Misconduct

As discussed in detail in Part D.4 below, during her cross examination of Hamilton and during closing argument, the prosecutor repeatedly and improperly expressed her opinion on Hamilton's guilt and maligned Hamilton, defense counsel, and Dr. Grassian. 25RP 36, 82-83; 28RP 114-115, 119, 124, 175, 177.

7. Conviction, sentence, and appeal

The jury returned a guilty verdict on the second degree assault. CP 46; 29RP 13-16.

Sentencing occurred the following day, October 2, 2014. 30RP 1-10. Hamilton objected to the application of the POAA, arguing Apprendi v. New Jersey[6] and Blakely v. Washington[7] required that the jury find any fact that increases the penalty for the crime beyond the statutory maximum. CP 107-11; 30RP 5-6. Specifically, Hamilton asserted the exception to fact-finding for prior convictions did not apply because the POAA, in contrast to the calculation of the offender score under the Sentencing Reform Act (SRA), chapter 9.94A RCW, required factual findings relating to the temporal relationship between the current offense and the prior offenses and convictions. CP 107-11; 30RP 5-6. In other words, the POAA offense pattern must have occurred, as a factual matter, as follows: offense→conviction→offense→conviction→offense→conviction. CP 107-11; 30RP 5-6; see also RCW 9.94A.030(37)(a)(i)–(ii) (listing prior conviction requirements that include temporal relationships between dates of conviction and dates of commission of offense). Hamilton contended that necessary factual findings regarding the temporal relationship placed the

[6] 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

[7] 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

POAA outside the scope of Apprendi's "fact of criminal conviction" exception. CP 107-11; 30RP 5-6. Hamilton also argued prior appellate cases were not controlling because they did not address this specific issue. CP 108-10.

The trial court engaged in its own fact finding with regard to the temporal sequence of prior offenses and convictions. 30RP 6-7. Doing so, it found "this in fact was a conviction for a third strike." 30RP 7. The trial court indicated it had no discretion but to impose a life sentence without the possibility of parole, and accordingly sentenced Hamilton to lifetime incarceration. CP 34, 97; 30RP 7-8. This timely appeal follows. CP 30.

C. ARGUMENT

1. REPEATED INSTANCES OF GOVERNMENT MISCONDUCT REQUIRE DISMISSAL

a. DOC's outrageous misconduct shocks the conscience, barring this prosecution as a matter of due process

Government conduct may be "'so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.'" State v. Lively, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996) (quoting United States v. Russell, 411 U.S. 423, 431-32, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973)). To violate due process, "the conduct must shock the universal sense of fairness." Id. (citing Russell, 411 U.S. at 432). "In evaluating whether the State's conduct violated due

process, [courts] focus on the State's behavior and not [on] the Defendant's predisposition." Id. at 22.

In Lively, a police informant attended Alcoholics Anonymous meetings and befriended an emotionally fragile recovering addict in order to arrange drug sales through her. Id. at 22-24. The court stated, "the government conduct demonstrates a greater interest in creating crimes to prosecute than in protecting the public from further criminal behavior." Id. at 26. "After reviewing and evaluating the totality of the conduct" the State engaged in, the court found "this conduct, as a matter of law, was so outrageous as to have violated due process principles." Id. at 27.

An outrageous conduct defense is not limited to police misconduct in the investigation of criminal activity, though "[m]ost cases of outrageous government conduct" are of this type. State v. Martinez, 121 Wn. App. 21, 35, 86 P.3d 1210 (2004). In Martinez, a deputy prosecutor failed to reveal exculpatory evidence until the middle of trial, two months after it was discovered. Id. at 33-34. After discussing Lively, the Martinez court concluded that the "withholding of exculpatory evidence until the middle of a criminal jury trial is likewise so repugnant to principles of fundamental fairness that it constitutes a violation of due process." Id. at 35. Quoting Justice Brandeis, the court stated,

> [D]ecency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example.

Id. (quoting Olmstead v. United States, 227 U.S 438, 485, 48 S. Ct. 564, 72 L. Ed. 2d 944 (1928) (Brandeis, J., dissenting)). Moreover, the court recognized that unless "the State knows that the most severe consequence that can follow" from its misconduct, "it will hardly be seriously deterred from such conduct in the future." Id. at 36 (citing State v. Cory, 62 Wn.2d 371, 377, 382 P.2d 1019 (1963)).

DOC's repeated outrageous and shocking invasions into Hamilton's privileged and confidential attorney-client communications, its attempt to cover it up, and its willful noncompliance with court orders designed to prevent future invasions are so repugnant that fundamental fairness bars this prosecution as a matter of due process of law.

Corrections officer Shannon Reeder conducted a 25- to 30-minute search of Hamilton's cell, which "is highly unusual absent a specific threat." CP 597; 2RP 26, 47, 79, 84, 128, 162, 487-88; 14RP 75. Witnesses testified Reeder appeared to be reading Hamilton's legal materials. 2RP 86-87, 117, 162-63, 168-69, 172, 175. After spending such a lengthy time pilfering through Hamilton's box of legal paperwork, which contained both work

product and attorney-client privileged information, Reeder exited the cell and exclaimed something to the effect of, "I was just trying to figure out how someone could sucker punch a corrections officer and claim he didn't have the intent." CP 597; 2RP 34-35, 89, 118, 165. Given that Hamilton's only defense was diminished capacity, the long period of time Reeder spent in Hamilton's cell and Reeder's statement demonstrate Reeder was invading Hamilton's attorney-client communications regarding this specific case.

Reeder came to court and lied under oath about reading Hamilton's legal papers. He testified the search was merely a routine search for contraband during which he found an unauthorized pen and paper clip. CP 598; 2RP 228-29, 242-43, 271-72. Reeder claimed he put this "contraband" from the search into his pocket and then disposed of it in an inmate-accessible trash can, which other DOC witnesses testified was contrary to DOC policy and reasonable practices. 2RP 229-30, 278-79, 336-37, 470, 495-96, 518-19, 531. Reeder apparently missed "additional staples and clips" that were present. CP 601; 2RP 518. As the trial court found, "Reeder's testimony that he did not read Mr. Hamilton's legal material is not credible. CO Reeder did read some of Mr. Hamilton's paperwork." CP 598.

Not only did Reeder invade Hamilton's communications with his attorneys, he or other DOC staff members attempted to hide the truth by tampering with a video that documented Reeder entering and leaving

Hamilton's cell. See 2RP 285-87, 460, 471-72, 500. As the trial court stated in its findings,

> A video documenting CO Reeder walking towards Mr. Hamilton's cell, and later leaving the cell, was provided to Defense Counsel. The video has two camera shots, each of which shows a different angle of CO Reeder approaching and leaving Mr. Hamilton's cell. One of the videos shows CO Reeder entering and leaving the area of Mr. Hamilton's cell. The other video speeds up at the exact times CO Reeder comes into the frames as he enters and leaves the cell.

CP 597. The trial court further stated that this speeding up of the video that skipped the precise times Reeder entered and exited Hamilton's cell was suspicious, especially in light of the "[t]estimony suggest[ing] that Reeder was only aware of the first camera angle. CO Reeder's conduct and the possible collusion with other DOC employees in tampering with the videotape, suggest government misconduct both voluntary and dishonest." CP 601.

Indeed, an agent of the State invaded the attorney-client communications of an inmate who was about to stand trial and faced life in prison, lied about the invasion on the witness stand, and tampered with evidence to cover up these misdeeds. Reeder's actions exceeded mere outrageous government misconduct—the actions were criminal. See RCW 9A.72.020(1) ("A person is guilty of perjury in the first degree if in any official proceeding he or she makes a materially false statement which he or

she knows to be false under an oath required or authorized by law."); RCW 9A.72.150(1)(a) ("A person is guilty of tampering with physical evidence if, having reason to believe that an official proceeding is pending . . . and acting without legal right or authority, he or she . . . [d]estroys, mutilates, conceals, . . . or alters physical evidence with intent to impair its appearance, character, or availability in such pending . . . official proceeding . . . ."). Reeder's conduct is so repugnantly outrageous that due process bars this prosecution.

Reeder's misconduct was not DOC's only shocking and outrageous intrusion into Hamilton's communications with his attorneys, however. DOC also failed to provide a meeting space for Hamilton and his defense team to confer in private and freely pass documents to each other. Hamilton and his lawyers were forced to meet in a secure cell that was "not soundproofed, ha[d] audio and video recording capabilities, and a Plexiglas room divider without a pass-through slot for document delivery between the parties." CP 597; 2RP 190-91, 362, 383-84, 469, 555-56. There were many DOC personnel who could overhear the attorney-client communications, especially because the defense team and Hamilton practically had to yell to communicate through the Plexiglas divider. 2RP 202, 365-66, 415, 417, 433, 557. Because they could not pass documents to each other, Hamilton's lawyer asked a DOC agent to physically deliver two documents to Hamilton for review. 2RP 367, 378, 398-400, 422, 559-60. The DOC officer was

absent with the documents for approximately 10 minutes and then delivered only one of them, explaining that the other document had to be sent through the prison mail system. 2RP 400, 405, 407, 425-27.

This egregious and shocking action also bars this prosecution. The DOC refused to let Hamilton meet in a room where he could pass documents with his attorneys, despite his attorneys' requests and despite the availability of such a room. This forced the attorneys, in order to have a productive meeting, to ask a prison officer to serve as a courier so that Hamilton could review certain documents. Rather than act as a courier, this officer read these documents and, based on their contents, chose to deliver one to Hamilton but not the other. Hamilton, who faced a charge that could result in lifetime imprisonment, had no opportunity to confer with his attorneys without the interference and obstruction of State actors. This is "so repugnant to the principles of fundamental fairness that it [also] constitutes a violation of due process." Martinez, 121 Wn. App. at 35.

Even in the face of this shocking misconduct, the trial court declined to dismiss the prosecution because it mistakenly believed it could fashion other suitable remedies. The trial court issued two orders at the end of the dismissal hearing. Supp. CP ___ (Sub Nos. 70 & 71); 2RP 625-28. The first order instructed DOC personnel not to read or scan Hamilton's legal correspondence "provided that the document bears an appropriate return

address, is properly marked as legal mail, and it is signed by members of Mr. Hamilton's defense team UNLESS there is a specific reason to believe the document contains nonlegal communications." Supp. CP ___ (Sub No. 71); 2RP 626. The second order required DOC to provide Hamilton and his attorneys a confidential meeting space where "no DOC staff are within hearing distance" and "where Mr. Hamilton may receive and return legal documents directly from and to counsel." Supp. CP ___ (Sub No. 70); 2RP 626-27. The order also expressly allowed counsel to "provide legal material to Mr. Hamilton during these visits" and instructed that DOC "may check for contraband, but not read the documents." Supp. CP ___ (Sub No. 70); 2RP 627.

DOC did not comply with these orders. The very next time defense counsel visited Hamilton, they were placed into a no-contact room in which they were "not allowed to pass documents back and forth" and were "separated by clear plexi-glass." CP 13; 11RP 29-30; 13RP 115, 129; 14RP 43. The room also recorded video but not audio. CP 13; 11RP 102-03; 13RP 29-30, 117, 173. The defense team needed legal papers from Hamilton. CP 14; 11RP 31, 100. DOC officer "William Swain told counsel that he had already discussed the issue with the defendant and they would not be allowed to pass papers at the meeting, but could mail them." CP 14; 11RP 31, 35, 101; 13RP 116. Hamilton's attorney explained the court order,

which Swain had already seen but ignored. CP 14; 13RP 115-16, 123-24, 141; 14RP 57-58. Defense counsel also asked Swain to contact the attorney general's office. CP 14; 11RP 32; 13RP 116. Neither Swain nor anyone else from DOC did so. 13RP 77-78, 119, 128-29, 146, 153-55. Defense counsel was then escorted out of the facility 15 minutes before the scheduled end of the meeting without explanation. CP 14; 11RP 32; 13RP 132.

The DOC's willful noncompliance with the trial court's orders—orders intended to ensure Hamilton's constitutional rights to confer confidentially with his attorneys—is additional outrageous misconduct. DOC's conduct defied the trial court's attempt to protect attorney-client communications from State interception. DOC did nothing more than thumb its nose at two duly issued court orders, illustrating there was no remedy short of dismissal to deter DOC from violating the rights of those who have pending court matters. "'[P]reservation of the integrity of conviction is at minimum as important as securing the conviction itself.'" Martinez, 121 Wn. App. at 36 (quoting trial court order). Given DOC's shocking and outrageous refusal to comply with court orders, "'without dismissal there is no remedy at all.'" Id. The DOC's repeated outrageous misconduct, its attempts to hide it from scrutiny, and its refusal to adhere to court orders rises to the level of a due process violation.

b. DOC's continual interference in Hamilton's privileged communications also requires dismissal under pertinent case law and CrR 8.3

Short of dismissal under due process principles, dismissal remains appropriate under State v. Peña Fuentes, 179 Wn.2d 808, 318 P.3d 257 (2014), State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963), State v. Garza, 99 Wn. App. 291, 994 P.2d 868 (2000), State v. Granacki, 90 Wn. App. 598, 959 P.2d 667 (1998), and CrR 8.3.

"A defendant's constitutional right to the assistance of counsel unquestionably includes the right to confer privately with his or her attorney." Peña Fuentes, 179 Wn.2d at 818. "The constitutional right to privately communicate with an attorney is a foundational right. We must hold the State to the highest burden of proof to ensure that it is protected." Id. at 820. In Peña Fuentes, the Washington Supreme Court squarely placed the burden on the State to "show beyond a reasonable doubt that the defendant was not prejudiced" by the State's intrusion into his communications with defense counsel. Id. This is so even "when the information is not communicated to the prosecutor." Id.

> The State is the party that improperly intruded on attorney-client conversations and it must prove that its wrongful actions did not result in prejudice to the defendant. Further, the defendant is hardly in a position to show prejudice when only the State knows what was done with the information gleaned from the eavesdropping.

Id. Only in "rare circumstances" is there no possibility of prejudice. Id. at 819.

"A trial court's decision to dismiss an action based on State v. Cory and under CrR 8.3(b) is reviewed for abuse of the court's discretion. Even under CrR 8.3(b), the burden is on the State to prove beyond a reasonable doubt that there was no prejudice to the defendant." State v. Granacki, 90 Wn. App. at 602 n.3 (citation omitted). By declining to dismiss this case after repeated shocking and unpardonable violations of Hamilton's right to counsel, the trial court abused its discretion.

The trial court determined misconduct had occurred. CP 599. It determined that it was misconduct for the DOC to place Hamilton and his attorneys into a no-contact room where they could not freely exchange documents. CP 599. It determined it was misconduct for DOC personnel to scan or read the contents of attorney-client communications and that DOC's legal mail policy constituted "government misconduct." CP 600. It also determined Reeder's 25- to 30-minute cell search in which he read privileged legal materials as well as the tampering with videotape evidence was "government misconduct both voluntary and dishonest" and was "shocking an[d] unpardonable." CP 600-01, 603; 3RP 4.

Yet the trial court did not dismiss. Instead, it placed the burden on Hamilton to demonstrate prejudice and concluded "there is no evidence that

the prosecution has actually obtained any information relating to Defendant Hamilton's case that it would use to prejudice the fairness of his trial." CP 603-04. The trial court also indicated that although the "cell search taken together with the apparent videotape tampering is certainly both shocking and unpardonable, suppression of the evidence at Defendant Hamilton's trial can eliminate any prejudice it could cause." CP 603. But this is no remedy at all—suppressing the evidence of the cell search and videotape tampering provides nothing to Hamilton, who does not know and cannot prove what was done with the products of Reeder's wrongdoing. Cf. Peña Fuentes, 179 Wn.2d at 820 ("[T]he defendant is hardly in a position to show prejudice when only the State knows what was done with the information . . . .").

Furthermore, the trial court acknowledged that appropriate remedies might also include instructing witnesses not to discuss the case with each other or with anyone else in an attempt to isolate any possible prejudice. CP 606 (discussing Granacki, 90 Wn. App. at 603-04 (excluding testimony and prohibiting eavesdropping witness from discussing case with anyone might be appropriate remedies)). The trial court also stated, "The people who *possibly* obtained information are quite indirectly involved . . . in [the] prosecution at issue." CP 606. But several DOC witnesses testified against Hamilton at trial regarding Hamilton's alleged assault on one of its own officers. The trial court never instructed any DOC officer not to discuss

Hamilton's case and never ordered any DOC officer not to disclose any information gleaned from DOC's interception of attorney-client communications with each other. Thus, although it identified remedies that might have sufficed, the trial court failed to provide one.

Even when the trial court learned that DOC was not obeying its orders, the trial court did nothing. Evidence adduced at the hearing on the motion to dismiss indicated that several DOC witnesses were made aware of the orders but chose not to follow them. 11RP 101; 13RP 115, 123-24, 153-55, 175. In addition, many witnesses failed to appreciate that reading a defendant's attorney-client privileged materials was improper government conduct. 2RP 534-35, 537; 13RP 170-71, 184-85, 188, 193-84. This misconception extended to assistant attorney general Douglas Carr, who believed the trial court lacked any jurisdiction over DOC whatsoever. 13RP 218-19; 14RP 76, 89, 133. The trial court stated it was "mad that the [DOC] violated my orders and apparently had a legal assistant who didn't even go to college advising the custody unit supervisor about whether to follow my order[.]" 16RP 98. The court clarified it was angry because

> one it is violating my order, two, it is affecting a person who has a right to a trial and a right to have his attorneys present. If the [DOC] and the AG's office do not like my orders, they have a remedy, which is to note a hearing and contest it, not to ignore it.

16RP 98. Nonetheless, the trial court found "there was a purposeful intrusion, but I can't find that [DOC's] ignorance of my court order was done with the purpose of intruding into the attorney-client relationship." 16RP 99. Thus, the trial court left the repeated violations of Hamilton's ability to communicate freely with his attorneys—violations it had already found and sought to remedy by issuance of court orders it acknowledged were being ignored—wholly without redress.

Lastly, defense counsel proposed alternative remedies related to Reeder's cell search. Supp. CP ___ (Sub No. 214); 17RP 39-44, 48-50. These remedies included (1) prohibiting DOC witnesses from testifying about Hamilton's ability to form intent; (2) excluding all video evidence in the case, including the DOC video of the alleged assault; and (3) in the event the video evidence is admitted, providing the jury with the court's finding that DOC had tampered with other video evidence. Supp. CP ___ (Sub No. 214); 17RP 39-42. The trial court refused to provide any of these remedies. 17RP 51-52.

c. <u>At minimum, remand is required for the trial court consider dismissal by properly placing the burden and beyond-a-reasonable-doubt standard of proof on the State</u>

The trial court placed the burden on Hamilton to demonstrate prejudice. CP 603-04 (concluding that "there is no evidence that the

prosecution has actually obtained any information," prejudice will not be presumed). This was error: where improper intrusions into attorney-client communications occur, "the State has the *burden to show beyond a reasonable doubt* that the defendant was not prejudiced." Peña Fuentes, 179 Wn.2d at 819-20 (emphasis added). Because the trial court's order was issued prior to the issuance of Peña Fuentes, the trial court did not apply its standard.

Defense counsel moved to reconsider the first dismissal motion based on Peña Fuentes. CP 517-25. The trial court denied the motion for reconsideration and, in so doing, refused to apply the proper standard and burden of proof. CP 435. Where the trial court applies the incorrect standard, this court is required to "remand for the trial court to consider whether the State has proved the absence of prejudice beyond a reasonable doubt." Peña Fuentes, 179 Wn.2d at 820. Short of dismissal, this court is still required to remand this case for application of the correct standards.

2. THE TRIAL COURT ERRED BY NOT SUMMONSING A NEW VENIRE OR BY NOT INSTRUCTING JURORS THAT HAMILTON'S CASE WAS A THIRD STRIKE CASE GIVEN A VENIREPERSON'S DISCLOSURE THAT HIS SECOND DEGREE ASSAULT CONVICTION CARRIED AN EXTREMELY LIGHT PUNISHMENT

Juror 18 told the venire he received a mere 72-day work release sentence upon conviction of the same crime for which Hamilton stood trial

and for which Hamilton faced life in prison without the possibility of release. 18RP 112. Juror 18's remarks affirmatively misled the jury into believing that the punishment Hamilton faced was insignificant and that Hamilton would receive individualized consideration at sentencing. The trial court allowed this misinformation to stand, declining to grant Hamilton's motion for a mistrial and refusing to alternatively instruct the jury that Hamilton would face a mandatory life sentence without parole upon conviction. 18RP 177; 19RP 6; CP 137. Juror 18's statements, which were left wholly unremedied, deprived Hamilton of a fair trial before an impartial jury.

Generally, "'[t]he question of the sentence to be imposed by the court is never a proper issue for the jury's deliberation, except in capital cases.'" State v. Townsend, 142 Wn.2d 838, 846, 15 P.3d 145 (2001) (quoting State v. Bownman, 57 Wn.2d 266, 271, 356 P.2d 999 (1960)). According to Townsend, this "strict prohibition" "ensures impartial juries and prevents unfair influence on a jury's deliberations." 142 Wn.2d at 846.

In Townsend, the court considered whether counsel rendered ineffective assistance by failing to object to the trial court's instruction to jurors that the case was not a capital case. Id. at 842, 847. Answering yes, the court stated that instructing the jury the death penalty was not involved "would only increase the likelihood of a juror convicting the petitioner." Id. at 847. The court reasoned, "if jurors know that the death penalty is not

involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility." Id.

More recently, in State v. Mason, 160 Wn.2d 910, 929-30, 162 P.3d 396 (2007), our supreme court reaffirmed this general rule. There, during voir dire, one juror expressed his or her opposition to the death penalty, to which the trial court responded that it was not a capital case. Id. at 929. The jury was further instructed that it would "'not be involved in any way in determining any sentence which may be imposed, in the event that a jury reaches a verdict of guilty."' Id. (quoting report of proceedings). Applying Townsend, the court indicated this instruction was error. Id. at 929-31.

While Mason applied Townsend's rule, it suggested the rule was not absolute:

> If this court was incorrect in Townsend then, upon a proper record, our decision should be challenged in a truly adversarial proceeding. If our reasoning was flawed in Townsend, and there are *legitimate strategic and tactical reasons why informing a jury about issues of punishment would advance the interest of justice and provide a more fair trial*, then counsel should zealously advance the arguments.

Id. at 930 (emphasis added). Not only does this language acknowledge the reality that advising jurors regarding punishment is a justifiable and reasonable approach to ensure a fair trial in some circumstances, it expressly invites zealous advocacy on this point.

Other Washington cases where the jury has been permitted to consider punishment strengthen Mason's call for challenges to Townsend's general rule where the circumstances justly demand. In State v. Portnoy, 43 Wn. App. 455, 458-59, 718 P.2d 805 (1986), for example, the trial court permitted Portnoy's accomplice in a second degree assault to testify about his plea to a reduced charge, "but forbade the defense to cross examine him so as to elicit the information that the firearm enhancement charge that Portnoy still faced required a mandatory minimum imprisonment." The trial court's prohibition was based on the general rule that "a jury should have no knowledge about the sentence to which a conviction might lead." Id. at 460. While Division Two stated it was generally correct to instruct the jury that it has nothing to do with punishment, it also noted, "we are referred to, and find, no authority suggesting that the State has the right to keep from the jury the extent of the punishment the defendant will face if found guilty, assuming that information is otherwise relevant." Id. at 460-61. The court reasoned, "The jury needs to have full information about the witness's guilty plea in order to intelligently evaluate his testimony about the crimes allegedly committed with the defendant. Unfair prejudice is avoided by this opportunity for full cross-examination." Id. at 461. Consistent with the remarks in Mason, under Portnoy's reasoning, a blanket prohibition on

informing the jury of sentencing consequences is not justified when it has the potential to undermine the fairness of the proceeding.

This court also substantially departed from Townsend's prohibition in State v. Rafay, 168 Wn. App. 734, 285 P.3d 83 (2012). In that case defense counsel "agreed that prospective jurors could be told the case did not involve the death penalty." Id. at 775. This court cited Mason's language to hold that defense counsel's actions represented a legitimate trial strategy and did not constitute ineffective assistance of counsel. Id. at 777. This court endorsed this purportedly strategic decision, even despite the fact that the record did "not disclose the precise basis for the parties' agreement about the death penalty advisement." Id. at 778. And this court proceeded to identify several conceivable reasons why defense counsel might have legitimately chosen to inform jurors about punishment. Id. at 778-81. Rafay, like Portnoy and Mason, unquestionably supports a more flexible approach that permits informing the jury about punishment in cases where such disclosures further the goal of fairness at trial.

In this case, as in Portnoy and Rafay, it was necessary to disclose to jurors the punishment Hamilton faced. Juror 18's statements in front of the entire venire that his conviction for second degree assault—the same crime for which Hamilton was on trial—resulted in a 72-day work release sentence affirmatively misled the other jurors. Not only did it give the jury the false

impression that a second degree assault conviction is not severely punished, but it also misinformed jurors that sentencing was individualized and discretionary. Short of summonsing a new venire altogether, the only way the trial court could have ensured Hamilton a fair trial was to inform jurors that Hamilton faced a compulsory life sentence upon conviction.

A strict prohibition on informing jurors about punishment makes little sense where, as here, a mandatory sentence follows conviction. The rationale lying beneath the Townsend rule is based on the division of labor between the fact finding function, which purportedly belongs to the jury, and the sentencing function, which purportedly belongs to the judge: "'The United States Supreme Court noted that '[i]t is well established that when a jury has no sentencing function, it should be admonished to "reach its verdict without regard to what sentence might be imposed."'" Townsend, 142 Wn.2d at 846 (alteration in original) (quoting Shannon v. United States, 512 U.S. 573, 579, 114 S. Ct. 2419, 129 L. Ed. 2d 459 (1994) (quoting Rogers v. United States, 422 U.S. 35, 40, 95 S. Ct. 2091, 45 L. Ed. 2d 1 (1975))). The problem with applying this rationale to all cases indiscriminately is that the jury *does have* a sentencing function in a POAA case. No separation of responsibilities between jurors and judges exists where a defendant faces a third strike under the POAA because it is the jury's verdict alone that mandates the sentence that follows. The trial court acknowledged as much

at sentencing. 30RP 7 ("And I don't believe under the law that I have any option but to sentence Mr. Hamilton to life in prison."). Hamilton's jurors were instructed they had "nothing whatever to do with any punishment that may be imposed in case of a violation of the law." CP 50. This was misinformation: by determining Hamilton's guilt the jury also determined Hamilton's punishment. The foundation supporting Townsend's general rule crumbles in this circumstance.

The "strict prohibition" against jurors considering punishment also directly contradicts how Washington courts instruct juries. Hamilton's jury was given the standard WPIC 1.02[8] instruction, "You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful." CP 50. This instruction expressly permits jurors to consider the issue of punishment to the extent it makes them careful. Its own terms contradict a blanket prohibition on the jury's consideration of punishment. Juries are welcome to consider punishment for the purpose of exercising due care.

Juror 18's remarks that a second degree assault conviction resulted in a very light sentence only could have made jurors less careful. The only information jurors received regarding punishment came from Juror 18. Because jurors heard that a conviction for the same crime at issue in

[8] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 1.02, at 13-15 (3d ed. 2008).

Hamilton's trial had resulted in a very light, nonjailable sentence, they were "less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out" than they would have been had they learned the true punishment Hamilton faced. Townsend, 142 Wn.2d at 848. Indeed, at least one of the jurors was so inattentive that he dozed off at least three times during trial, which the trial court remedied by relegating him to alternate juror status. 27RP 172; 28RP 3-5. As Townsend recognized as a matter of common sense, jurors informed about a lesser punishment will exercise correspondingly lesser care in their decision making.

Defense counsel attempted to remedy this unfairness by moving for a mistrial to convene a new venire or, alternatively, by instructing the current venire that Hamilton faced a mandatory life sentence. 18RP 176; 19RP 4; CP 134-37. The trial court refused. 19RP 6. Although the trial court indicated it would "see if there's another [instruction] that [it] might come up with" to provide a remedy, it never did so. 19RP 6. A fair and impartial jury is necessarily one that has not been misinformed regarding issues of punishment. Because either dismissing the venire or informing the jury that Hamilton faced far more punishment than a 72-day sentence was necessary to "advance the interest of justice and provide a more fair trial," Mason, 160 Wn.2d at 930, Hamilton asks this court to reverse and provide him with a

jury that is not exposed to extremely misleading information regarding punishment.

3. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO CROSS-EXAMINE HAMILTON'S EXPERT USING CONCLUSIONS CONTAINED IN NONTESTIFYING PROVIDERS' TREATMENT REPORTS

During its cross examination of defense expert Stuart Grassian, M.D., the State read excerpts from various prison records and medical records Grassian had reviewed but had not relied on in rendering his diagnoses of Hamilton. 23RP 165-90; 25RP 87-158. To purportedly impeach Grassian's opinion, the prosecutor read numerous conclusions from these records into evidence to show Hamilton had engaged in unlawful and harmful behaviors at various prisons, suffered from antisocial personality disorder, and had feigned mental illness, including suicide attempts, to manipulate providers:

- Hamilton "acting out" according to Pierce County records, such as "things involving feces, breaking property, that kind of thing," 23RP 162;
- "[S]elf-harm" behaviors during an "incident where [Hamilton] was spitting, was punished for that, felt that was unfair and acted out, cut his forearm, and needed stitches," 23RP 169-70;
- Hamilton involuntarily medicated with Haldol given that he "was acting out, made some threats, as is his normal," "was yelling, screaming, pounding, kicking on the cell door," and "actually threatened to sue DOC because of that involuntary medication," 23RP 170-72;

- "[O]n November 18th, 2008, [Hamilton] accused a -- well, he got in a fight with a -- not a fight, but issues with A unit staff over a TV, accused the corrections officer of sexual advances . . . . threatened to hurt himself with a plan." "It says he will destroy his cell, hurt himself and/or assault staff if not taken off A unit," 23RP 172-73;

- On November 19, 2008, Hamilton "is yelling in his cell, and when questioned about his behavior, he says I did it so I could tell people that I'm being mistreated, I want to use the phone and get moved" and is "using the threat of suicide to get something that he wants," 23RP 173-74;

- "There are certainly some substantial periods where he is acting out because he wants to take a break from [Intensive Management Unit] and go to the mental health unit," 23RP 174-75;

- On February 21, 2008, Hamilton has "been acting out, he's on a four-point restraint, but speech is coherent, rational, goal directed," which according to the prosecutor, "shows that he can control himself, even when agitated," 23RP 175-77;

- The prosecutor questions Grassian about an episode where Hamilton stockpiled pills and overdosed, but the overdose was not fatal, 23RP 178-80;

- "And there was another incident where he was admitted to St. Mary Medical Center in Walla Walla, and that was January 15th of 2001" where "[h]e reported taking 20 to 30 Robaxin, even though he'd only been given 14 over the past few days, and he reported taking 21 Motrin, even though he'd only been prescribed 17 over the past few days, and then he described taking some undefined pills," and the medical record "say[s] patient did not demonstrate any symptoms of having taken an overdose of Robaxin or even Motrin," 23RP 180-81;

- Hamilton's letter to associate superintendent about wanting to move to B unit in which he purportedly states, "I'm going back to my destructive ways and overall will be a problem," "[b]eing placed in the mental health unit will not carry my best interest, instead it will cause more problems," 23RP 182-84, 186;

- Hamilton's competency evaluation in Western State Hospital report from November 23, 1999, in which "Hamilton said he's been high on

formaldehyde or methamphetamine" and "proceeded to relate a story about being followed by the FBI for six or seven days, claims he can see the rap star Tupac Shakur sitting next to him." According to the record, "this was not a convincing display of psychosis," 23RP 186-88;

- In August 1999, the release summary "[d]iscusses Mr. Hamilton's lack of remorse and failure to assume responsibility for his actions," and indicates Hamilton stated, "I wanted to come here to get more food and get outside. I hate the Court system," 23RP 189-90;

- Record from December 10, 1999 in which a Dr. Rolf Kolden concludes Hamilton "makes it a plausible case that he does not have a mental illness, which is what forensic evaluation at Western State Hospital concluded, but thought he could make his life better by feigning one," 25RP 87-89;

- Record from August 11, 2003 in which Hamilton was "found in his cell with a noose around his neck," in which the mental health provider "indicates that Hamilton is capable of self-harm just to make a point" or "just to gain respite from [Intensive Management Unit]," 25RP 94-95, 102-03;

- "[O]n January 16th, 2001, there's a doctor, Dr. Cardell (phonetic), MD, who again indicates he sees no sign of psychosis, and malingering is likely," 25RP 107;

- A February 23, 2000 record attributes to Hamilton the statement, "Where am I, they were trying to kill me at SOC, the FBI put out a hit on me because I robbed two banks with CIA money in it, so they go like six OCs to try and kill me . . . . And the nurse at SOC came around twice a day and gave me what she called holy pills, because I'm a Seventh-Day Adventist, and she said to save them for seven days and then take them and I would go to heaven, and be safe," which the author of the record, "strongly suspect[ed] malingering, but perhaps time will tell," 25RP 109-11, 116-22;

- A later February 23, 2000 chart note states "someone overhears a neighboring tier start the conversation with: Are you the guy who worked with the CIA. Hamilton replies, no, I'm just fucking with them" and "goes on to explain exactly what he was taking, what he took, Seroquel, Wellbutrin and Trazodone," 25RP 112;

- Under the February 23, 2009 chart note's assessment, it states, "Once again IM Hamilton has admitted to malingering. He no longer tells his previous story of holy pills given to him through under cover runs. I have no doubt . . . this inmate is feigning mental illness in an attempt to manipulate placement," 25RP 113;

- Prosecutor recites a psychiatric record that states "at times he claims to hear voices, and then he starts to ramble aggressively into other areas, objective, no evidence of overt or active psychotic processes . . . . Assessment, elaborating symptoms with no evidence of actual disease process evident," 25RP 125-26;

- July 20, 2005 record that states, "I do see him as being capable of upping the ante by performing some suicidal gestures to get what he wants and then he implies if he does not get some help prior to his release date he may get so mad he will kill a lot of people. He blames everyone but himself for this behavior. He seems to have no remorse or empathy for others. I see him as having a borderline personality disorder, and possibly a psychopath," 25RP 127-28;

- From the same provider as the immediately preceding bullet point, on a different date in 2005, the prosecutor suggested a record showed antisocial personality disorder given Hamilton "talks about purposefully breaking the phone in the day room, but would not give a reason why," and indicates Hamilton "said he's getting out in a year, and needed to make some gate money by suing DOC, and just looking for a reason," 25RP 128-29;

- The prosecutor referred to another record that reports Hamilton broke a radio after being infraction-free for eight months, which, according to the record, Hamilton explained, "I was tired of being lied to, my whole reason for being infraction free is I was told that if I was infraction free I would be on the other side of the mountain," which according to the prosecutor "show[s] goal-directed behavior even when acting out," 25RP 131-32;

- December 11, 2003 record in which "Hamilton is again threatening suicide," and stating, "You need to admit me to the third floor or I will strangle myself," 25RP 132-33;

- Prosecutor reads another record that Hamilton "had covered his cell door window so they couldn't see," "[s]tated he was going to commit

suicide," "the nurse and the CO hear a choking sound and silence, and a code is called," and "then [Hamilton] begins to laugh," which according to the prosecutor "would be a sign of either attention seeking or manipulation," 25RP 134-35;

- A May 31, 2003 record reported Hamilton "admitted he had broken the sprinkler head in his cell on purpose because he wanted to see the COs do what you do," which according to the prosecutor "would be another example of just doing these things for attention," 25RP 136;

- In a June 1, 2003 chart note, Hamilton "mentions how many screws were on the light fixture, and stated this is all a game, it's just a game," 25RP 137-38; and

- In juvenile chart notes, the prosecutor referred to "Joseph Dooby (phonetic), MD, he's a doctor that's seen fairly frequently through his juvenile records," who states the "Axis I diagnosis is conduct disorder, socialized aggressive," "[t]here are ADHD features, but the prevailing clinical picture is best described as psychopathic," 25RP 140-41.

The trial court erred in allowing the State, under the guise of impeachment, to parade such a voluminous amount of inadmissible hearsay and prejudicial ER 404(b) evidence in front of jurors. This error requires reversal for several reasons.

a. <u>ER 703 and ER 705 do not permit unrelied upon opinions and conclusions of nontestifying treatment providers to be introduced in cross examination for impeaching expert testimony</u>

ER 703 allows an expert to base opinions on inadmissible evidence as long as the evidence is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." ER 705 provides, "The expert may testify in terms of opinion or inference and give

reasons therefor without prior disclosure of the underlying facts or data." However, the "expert may in any event be required to disclose the underlying facts or data on cross examination." ER 705. Here, though he reviewed them, Grassian did not rely on any of the medical reports the State read into evidence to render his opinion, and in fact specifically disputed many of these records' contents. Because Grassian did not rely on conclusions and opinions in these records, they did not provide valid grounds for impeachment.

The Washington Supreme Court has so indicated, holding that while ER 703 and ER 705 "'permit the disclosure of otherwise hearsay evidence to illustrate the basis of the expert witness'[s] opinion, *they do not permit the unrelied upon opinions and conclusions of others to be introduced in cross-examination for impeachment purposes*.'" Wash. Irr. & Dev. Co. v. Sherman, 106 Wn.2d 685, 688, 724 P.2d 97 (1986) (quoting Ferguson v. Cessna Aircraft Co., 132 Ariz. 47, 49, 643 P.2d 1017 (Ariz. Ct. App. 1981)). The only proper way for the State to impeach Grassian's opinion with the conclusions of other providers was to call these other providers as witnesses. Sherman, 106 Wn.2d at 689.

Here, as in Sherman, there was no indication that Grassian relied on any of the opinions or conclusions in the records the prosecutor read into evidence to formulate his diagnosis. Although Grassian reviewed the

voluminous records themselves, he made clear that he never relied on the conclusions or the opinions expressed in the records to render his opinion on diminished capacity. In fact, during cross examination, Grassian indicated he disagreed with or discounted various statements and opinions contained in these records, including many of those he recalled reviewing. See, e.g., 23RP 169 ("I'm not going to accept [diagnoses] simply on the basis of the fact the person had a Ph[.]D[.], but there is, you know, a significant amount of information here that's consistent with the diagnoses that [this psychologist] reaches."); 23RP 176 (Grassian indicating "part of [the record] is just [a psychologist's] speculation about why it's like that"); 23RP 183 (Grassian stating to the prosecutor, "You're just showing particular episodes over the course of 20 years or so. So what?"); 23RP 186 (Grassian noting Hamilton "was a 20-year-old kid when he wrote this. It's all pretty foolish"); 23RP 189-90 (Grassian would not agree with the conclusions of a psychiatrist who had more time to observe and evaluate Hamilton because "I don't know what was done during that period of time"); 25RP 88 (Grassian doesn't "recall reading" a specific note); 25RP 89 ("That's a very small piece of evidence. I mean, there's a huge amount of evidence of prior behaviors, things that were seen, observed, which he is not responding to or commenting on."); 25RP 89 ("You're asking if [what is listed in a chart note] is a comprehensive review, and I'm saying no, no, it's not at all. This

is taking Mr. Hamilton's word for it, and for whatever reason Mr. Hamilton is so stating at this moment. So that doesn't constitute an evaluation."); 25RP 92-93 (Grassian unconvinced by conclusions drawn in psychological record); 25RP 108 (Grassian frustrated by prosecutor's attempt to show malingering from a particular record, states "whether or not he's malingering at this moment in time doesn't really go to the question of whether he has a serious mental illness. Do you understand the difference . . . . because you're . . . countering my definition -- my opinion that he has a serious mental illness"); 25RP 111 ("You see, that is the confusion. To label him a malingerer is a statement that's very different from is this an example of malingering."); 25RP 124 ("I think if you go from, you know, point to point, you could -- there are thousands of pages of medical records, and I can't -- I'm not going to be able to assess at every moment in time whether he's in a good mental state or whether he's . . . not."); 25RP 125 ("Well, in this particular [record] what he's saying is not accurate."); 25RP 126 (statement contained in record "makes no sense" and is "an illogical statement"); 25RP 128 ("I think that this master's level person makes the statement but doesn't provide any evidence . . . upon which to base the statement."); 25RP 143 ("I cannot endorse or fail to endorse whether [Hamilton] had an adequate trial of Lithium. I don't know. I mean, it says he didn't respond to a trial of Lithium. How careful Dr. Dooby was in doing that trial, I have no idea.").

Grassian did state the medical record review was important but noted, "You don't make a decision necessarily from the [medical] record, but the [medical] record is relevant, you know, and has to be considered and understood." 25RP 94-95. Although Grassian had reviewed the medical records, the State failed to establish that Grassian had relied on the conclusions or opinions of nontestifying providers to formulate his opinion that Hamilton lacked capacity to form the intent to assault.[9]

Grassian's lack of reliance on the medical records was further illustrated by the critique of the quality of DOC's treatment records he provided during direct examination:

> I mean, there's a lot of records. And it's like helter-skelter. One person makes one diagnosis, one person makes another, than a person makes a third diagnosis, not even looking at some factual material that was contained in an earlier note that totally makes this diagnosis make no sense.
>
> It's clear that there's no continuing record, there's no accumulation of knowledge . . . . I mean, they have nothing to base . . . their information on, and so they just have these impressions of the moment. And it's helter-skelter, it changes all the time, and it often makes no sense.

23RP 47. Grassian also criticized the DOC's prescription of drugs: "And medications change all the time, and they don't necessarily make any sense. And when they stop the medication or started them, there's not real . . .

[9] Grassian stated he had created a list of records he did rely on in drafting his report, but had misplaced the list at the time of trial and could not provide it during testimony. 25RP 97, 147-48.

discussion." 23RP 47. Most damning, Grassian stated, "the mental health record really reveals grossly inadequate service. People don't know [Hamilton]; . . . people who are untrained make diagnoses; people who are trained make diagnoses but don't look at past records to see . . . whether that diagnosis makes any sense." 23RP 48.

This testimony confirms that Grassian had little confidence in the records the State questioned him about and did not rely on them in forming his opinion. The prosecutor also characterized her cross examination of Grassian as impeaching him on matters he "should have considered" or "chose to ignore" in rendering his diagnosis, demonstrating the State was well aware that Grassian had not relied on the conclusions in the medical records the State questioned him about. 25RP 10, 165.

Because the State failed to establish Grassian's reliance on the records, its purported impeachment of Grassian was improper. As the Washington Supreme Court stated in Sherman,

> "Plaintiff's witness did not state that he had relied on the report, even though he had admitted that he had seen it. Until defendant established that plaintiff had relied on the report of the other doctor, *it was improper for the defendant to read from that report in cross-examining plaintiff's witness*."

106 Wn.2d at 689 (emphasis added) (quoting Bobb v. Modern Prods., Inc., 648 F.2d 1051, 1055 (5th Cir. 1981)). Indeed, if the State "wished to impeach [Grassian] or introduce additional medical testimony by using the

reports of non-testifying physicians, [it] should have done so by calling these physicians as witnesses." Sherman, 106 Wn.2d at 689. The conclusions of nontestifying providers whose conclusions Grassian did not rely upon should not have been introduced in cross examination under the pretext of impeachment. Id. at 689-90.

Division Two's opinion in State v. Acosta, 123 Wn. App. 424, 98 P.3d 503 (2004), is also instructive on this point. There, the State's expert testified regarding Acosta's criminal history to support his conclusion that Acosta suffered from antisocial personality disorder, in order to bolster his conclusion that Acosta's capacity was not diminished. Id. at 435-36. In addition, the State's expert testified "the purpose of looking at Acosta's life history was to 'understand[] the veracity of information he provides in regard to diminished capacity' and 'the nature of the behavior he presents at the time of the alleged offense.'" Id. at 437 (quoting report of proceedings). The expert's "reliance on Acosta's criminal record was unreasonable because he did not know the facts surrounding the arrests and convictions." Id. at 436. Division Two concluded the expert used Acosta's prior bad acts for the impermissible purpose of "establish[ing] Acosta's bad character, which . . . is improper." Id. at 437.

The same impropriety occurred in this case through the prosecutor's cross examination of Grassian. As in Acosta, the prosecutor questioned

Grassian to undermine the "information he provide[d] in regard to diminished capacity" and "the nature of the behavior [Hamilton] present[ed] at the time of the alleged offense." Id. The prosecutor recited various bad actions Hamilton undertook as reported in medical records, such as breaking prison property and feigning symptoms to manipulate treatment providers, to bolster the State's theory that Hamilton suffered from antisocial personality disorder—all of which was meant to undercut Hamilton's diminished capacity defense. And, as Grassian repeatedly indicated, he was unfamiliar with several of the details of Hamilton's actions and could not verify the accuracy of the various providers' reports. Id. at 437. As in Acosta, the prosecutor's purported impeachment of Grassian was nothing more than the State's unlawful use of prior bad acts to establish Hamilton's bad character. The State's attempt to impeach Grassian was improper.

b. The statements read by the prosecutor in its impermissible attempt to impeach Grassian consisted entirely of inadmissible hearsay

The excerpts of records the State used in an attempt to impeach Grassian were also inadmissible because they were hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is not admissible. ER 802. "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined

statements conforms with an exception to the hearsay rule provided in these rules." ER 805. While the statements attributed to Hamilton might not have constituted hearsay because they were "offered against [Hamilton] and [were] . . . [Hamilton]'s own statement[s]," ER 801(d)(2), the various prison medical records that reported these statements remained hearsay and were therefore inadmissible.

The State took the position at trial that statements in medical records are not hearsay. 23RP 161 (In response to a hearsay objection, State indicates "it's in his medical record"); 25RP 104 ("These are both medical records and statements of the defendant offered against him. They are not hearsay, and they are admissible for the truth of the matter asserted."); 25RP 164 ("But they're medical records. And medical records are yet another exception to the hearsay rule."). The State was mistaken.

Medical records, like other business records, are admissible as evidence through chapter 5.45 RCW, the Uniform Business Records Act. This statute governs the admissibility of "records such as 'payrolls, accounts receivable, accounts payable, bills of lading' and similar records that are 'the routine product of an efficient clerical system.'" In re Welfare of J.M., 130 Wn. App. 912, 923-24, 125 P.3d 245 (2005) (quoting Young v. Liddington, 50 Wn.2d 78, 83, 309 P.2d 761 (1957) (citing New York Life Ins. Co. v. Taylor, 147 F.2d 297, 300 (D.C. Cir. 1944))). "What such records have in

common is that cross-examination would add nothing to the reliability of clerical entries: *no skill of observation or judgment is involved in their compilation*." J.M., 1390 Wn. App. at 924 (emphasis added).

In J.M., a parent whose parental rights had been terminated, appealed the admission of "psychological assessments, progress notes, and recommendations" by various treatment providers whose opinions "were merely parroted by live witnesses" in court. Id. at 922. Division Three held this was error, stating, "The records at issue here were hardly routine clerical notations of the occurrence of objective facts. The evidence documented in these records involved a high degree of skill of observation, analysis, and professional judgment. The business records exception does not, then, apply." Id. at 924. The court continued, "the business records exception does not, nor should it, allow for the admission of expert opinions for which the opportunity to cross-examine would be of value—like psychiatric diagnoses. *Documentary evidence is inadmissible as a business record for the purpose of proving conclusions recorded in them*." Id. (emphasis added) (citation omitted) (citing Miller v. Arctic Alaska Fisheries Corp., 133 Wn.2d 250, 260 & n.4, 944 P.2d 1005 (1997) (citing Young, 50 Wn.2d at 83)).

Just as in J.M., the various conclusions and observations in the medical records the State used to cross-examine Grassian were not admissible. These records all involved purported observations, analysis, and

the exercise of professional judgment, a far cry from the routine products of an efficient clerical system that underpins the business records hearsay exception. And cross examination would have provided a valuable tool to challenge the professional judgments, observations, and assessments of Hamilton's alleged wrongdoing contained in the records. The conclusions recorded in the various records, which the State improperly employed for impeachment, were entirely inadmissible hearsay.

Moreover, even if all Hamilton's medical records did fall under the statutory business records hearsay exception, the State provided no foundation for their admission. RCW 5.45.020 provides,

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness *testifies to its identity* and *the mode of its preparation*, and if it was made in the regular course of business, *at or near the time* of the act, condition or event, and if, in the opinion of the court, the sources of information *method and time of preparation* were such as to justify its admission.

(Emphasis added.) The State offered no witness to testify to the identity of any of the records it used while cross-examining Grassian. Nor did any witness provide information regarding the records' mode or time of preparation. "While the [Uniform Business Records Act] is a statutory exception to hearsay rules, it does not create an exception for the foundational requirements of identification and authentication." State v.

DeVries, 149 Wn.2d 842, 847, 72 P.3d 748 (2003). Even assuming the State was correct that the records were somehow exempt from the hearsay rule, the records were still inadmissible given the State's failure to provide necessary identification and authentication for the records. The State's use of the records in cross-examining Grassian was error.

No other exception to the hearsay rule applied. Given that these are medical records, the State might have contemplated ER 803(a)(4)'s medical diagnosis or treatment exception when it claimed medical records automatically overcome the hearsay bar. If so, the State was again mistaken.

ER 804(a)(4) excepts from the hearsay rule "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." The rationale for this exception "is that we presume a medical patient has a strong motive to be truthful and accurate. This provides a significant guarantee of trustworthiness." State v. Perez, 137 Wn. App. 97, 106, 151 P.3d 249 (2007).

Here, the statements of records' authors were not made to seek further medical treatment; they were made to document Hamilton's actions. Under the language of ER 804(a)(4), the statements do not fall under the exception.

Nor can the various providers' statements fall under this court's recent decision in State v. Doerflinger, 170 Wn. App. 650, 663-64, 285 P.3d 217 (2012), in which a radiologist ordered a CT scan to rule out any additional underlying facial bone injuries. This court held that the radiologist's statements "were made for the [precise] purposes of diagnosis and treatment" and therefore were admissible under ER 803(a)(4). Id. at 664-65. Unlike those in Doerflinger, the statements at issue here were not solely for the purposes of future treatment but rather for documenting Hamilton's destructive activities and purportedly deceitful behavior. As the Doerflinger court suggested, statements that "amount to an opinion on causation or fault," would fall outside the hearsay exception. Id. at 663. And, as Dr. Grassian testified, there was no continuity or cohesion to the records, which amply distinguishes the CT scan at issue in Doerflinger. The hearsay statements of various providers in prison and medical records do not fall under the treatment and diagnosis exception or under any other exception to the rule against hearsay. The statements were inadmissible.

c. The trial court erred in instructing the jury to consider the statements attributed to Hamilton in prison medical records as substantive evidence, i.e., for the truth of the matter asserted

The trial court further exacerbated the prejudice by confusing the purpose for the admission of the statements. The court erroneously

instructed the jury, "Mr. Hamilton's statements -- this is a limiting instruction. Mr. Hamilton's statements that are referenced [in the records] are not hearsay. They are offered, they can be considered for [the] truth of the matter asserted." 25RP 105. The court repeated, "Any statements made by Mr. Hamilton [reported in the records] can be considered for the truth of the matter asserted." 25RP 105. As discussed, the records and their contents, including Hamilton's statements, were not admissible because they were hearsay. But even had they been admissible, their admission should necessarily have been limited to the purposes of expert opinion, not as substantive evidence.

Under ER 703 and ER 705, "[t]he trial court may allow the admission of otherwise hearsay evidence and inadmissible facts for the purpose of showing the basis of the expert's opinion." Group Health Co-op. of Puget Sound, Inc. v. Dep't of Revenue, 106 Wn.2d 391, 399, 722 P.2d 787 (1986) "The admission of these facts, however, *is not proof of them*." Id. at 399-400 (emphasis added). As the Washington Supreme Court has explained,

> "[I]f an expert states the ground upon which his opinion is based, his explanation is not proof of the facts which he says he took into consideration[.] His explanation merely discloses the basis of his opinion in substantially the same manner as if he had answered a hypothetical question. It is an illustration of the kind of evidence which *can serve*

> *multiple purposes* and is admitted for a *single, limited purpose only*."

State v. Wineberg, 74 Wn.2d 372, 384, 444 P.2d 787 (1968) (emphasis added) (quoting State Highway Comm'n v. Parker, 225 Or. 143, 160, 357 P.2d 556 (1960)); see also State v. Lucas, 167 Wn. App. 100, 109, 271 P.3d 394 (2012) ("[O]ut-of-court statements on which experts base their opinions are not hearsay under ER 801(c) because they are not offered as substantive proof . . . . Rather, they are offered 'only for the limited purpose of explaining the expert's opinion.'") (quoting 5D KARL B. TEGLAND, WASH. PRACTICE: COURTROOM HANDBOOK ON WASH. EVIDENCE, author's cmts. at 387, 400 (2011-2012 ed.)); State v. Martinez, 78 Wn. App. 870, 879, 899 P.2d 1302 (1995) ("While ER 703 allows an expert to base an opinion on facts or data reasonably relied on by experts in their field, even if these facts or data are otherwise inadmissible, when the court admits such testimony it is *not substantive evidence*." (emphasis added)), abrogated in part on other grounds by State v. Kinneman, 155 Wn.2d 272, 287-88, 119 P.3d 350 (2005); State v. Anderson, 44 Wn. App. 644, 652, 723 P.2d 464 (1986) ("Tegland notes that courts have been reluctant to allow the use of Rule 705 as a mechanism for admitting otherwise inadmissible evidence as an explanation of the expert's opinion. We agree and conclude that ER 705

does not provide such a mechanism to avoid the rules for admissibility of evidence." (citation omitted)).

The statements attributed to Hamilton in the prison records were not admissible as impeachment evidence because Hamilton's expert did not rely on them in rendering his expert opinion. See supra Part D.3.a. But even assuming Hamilton's statements could come into evidence, the only purpose for which they were offered was to impeach an expert opinion. That is, the State offered the statements only to attack Grassian's diagnosis of Hamilton; the records containing the statements were never admitted for any other reason. 25RP 165 (prosecutor stating, "I could admit those pages where he made those statements as medical records . . . but I think that might confuse the issues more, and it would be more prejudicial to have the jury go back there with those things, because the purpose of this is to impeach Dr. Grassian and his opinion"). Thus, under Wineberg and Group Health Co-op., Hamilton's statements in the records, to the extent any was admissible at all, should have been limited to the purpose of expert opinion, not to prove the truth of the matter asserted. By instructing jurors that they could substantively consider Hamilton's statements for the "truth of the matter asserted," 25RP 105, the trial court gravely erred.

d. The admitted statements also were inadmissible under ER 404(b) and ER 403, and the trial court failed to engage in any analysis on the record regarding these rules

Under ER 404(a), "[e]vidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." The State introduced several instances of Hamilton's previous prison misconduct and feigned psychological issues during its cross examination of Grassian. The State's clear purpose, albeit under the guise of impeachment, was to demonstrate that Hamilton had been violent, destructive, and had faked his mental illness in the past in order to support its theory that Hamilton was violent, destructive, and faking his mental illness with regard to the instant assault. This propensity evidence was inadmissible.

"ER 404(b) distinguishes between evidence offered to establish conformity with prior bad behavior, and evidence offered 'for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident.'" Acosta, 123 Wn. App. at 434 (quoting ER 404(b)). To determine whether such evidence is admissible under ER 404(b), the trial court must (1) find by a preponderance of the evidence that the prior misconduct at issue occurred; (2) identify the proper purpose for which the evidence will be introduced; (3) determine the

evidence is relevant; and (4) find the probative value of the evidence outweighs its prejudicial effect. State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). With regard to this balancing test, the Washington Supreme Court has stated, "We cannot overemphasize the importance of making such a record." State v. Jackson, 102 Wn.2d 689, 694, 689 P.2d 76 (1984). Thus, "[a] trial court abuses its discretion where it failed to abide by the rule's requirements." State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

The contents of the records attribute several bad acts and statements to Hamilton. But these acts and statements were never proved in the trial court, so there is "no way to evaluate whether the underlying act[s], or the intent behind the act[s], even occurred." Acosta, 123 Wn. App. at 434 (citing State v. Benn, 120 Wn.2d 631, 653, 845 P.2d 289 (1993)).

Because the trial court never determined whether these acts and statements even occurred, it likewise never identified the proper purpose for their admission. Acosta, 123 Wn. App. at 434. The State sought to introduce these acts and statements to counter Grassian's opinion that Hamilton lacked intent. Assuming this evidence would arguably "tend to establish [Hamilton]'s state of mind at the time he . . . committed the current offense," such evidence would be admissible only "if it satisfies the other rules of evidence." Id. As discussed, the impeachment of Grassian with

unrelied upon conclusions of nontestifying treatment providers was improper and the conclusions contained in the records were otherwise inadmissible hearsay. There was no proper purpose for admitting this ER 404(b) evidence.

As for the relevance of the statements and acts, defense counsel moved in limine to exclude all prison infraction and misconduct history under ER 404(b) because "we can't establish that those, in fact, occurred," "so they're not relevant." 16RP 31; see also CP 216 ("Even if the instances of misconduct are proven by a preponderance of the evidence, they are not probative of the defendant's state of mind on August 23rd, 2012."). The trial court agreed and granted the defense motion on this basis, instructing the State "to not go into the prior prison or jail misconduct" unless the State brought "it up outside the presence of the jury." 16RP 33. As the trial court properly concluded before trial, this evidence was not relevant. Moreover, the relevancy of the various statements and acts the prosecutor introduced is especially dubious given that many of these acts and statements allegedly occurred more than 10 years ago, and none was more recent than 2009. Given this gap in time, there was no "logical theory to show how [Hamilton]'s prior acts [or statements] are relevant to his intent to commit the current offense[]." Acosta, 123 Wn. App. at 435 (citing State v. Wade, 98 Wn. App. 328, 335, 989 P.2d 576 (1999)).

With regard to ER 403 balancing, the probative value was outweighed by the danger of unfair prejudice. The probative value of these statements was narrow: again, the State brought this evidence in only to attack Grassian's opinion. As Division Two held in Lucas, "'the proper way to test the reliability of the [expert's] opinion [i]s through cross-examination of the [expert], not by' . . . impeaching the defendant with a prior conviction" or prior bad acts. 167 Wn. App. at 110 (alterations in original) (quoting State v. Eaton, 30 Wn. App. 288, 291-93, 633 P.2d 921 (1981)). Given that the State had other avenues to attack Grassian's opinion without relying on Hamilton's statements and acts recorded in prison records, the probative value of this evidence was low. But the risk of unfair prejudice was high: after hearing the litany of Hamilton's prior prison misbehavior, the jury was left to conclude that Hamilton merely had acted in conformity with his prior conduct. On balance, the potential prejudice of Hamilton's prison history significantly outweighed any probative value. The trial court erred in allowing the State to present inadmissible ER 404(b) evidence to the jury, especially when it failed to conduct any aspect of the required analysis.

e. To the extent that defense counsel forfeited any claim of error by failing to object to the State's recitation of inadmissible evidence, defense counsel rendered ineffective assistance

The State may argue that defense counsel did not sufficiently object to preserve the full range of errors that occurred during the State's cross examination of Dr. Grassian. These errors were preserved by objections on the record and by pretrial motions, however, and insofar as any was not, it is a result of ineffective assistance of trial counsel.

i. Nature of objections during cross examination of Grassian

The cross examination of Dr. Grassian spanned two days, September 22 and September 24, 2014.

On the first day, defense counsel did not object to the State's use of Hamilton's prison medical records on the basis of improper impeachment, hearsay, or ER 404(b), although defense counsel did make several objections regarding the State's "testifying" rather than "asking a question" of Grassian. 23RP 180-81, 184, 189.

On the second day of Grassian's cross examination but before Grassian testified, defense counsel lodged an objection to the State's request to bring in evidence of Hamilton's prior prison assaults to attack Grassian's diagnoses and opinion:

> First off, the starting point for all of this is 404(b), regardless of what [the prosecutor] says. These are being

> offered at some level to prove that he acted in conformity therewith. Therefore the Court needs to make a finding by the preponderance of the evidence that any of these incidents did, in fact, happen. That would require months, weeks, days of testimony to make those determinations. That hasn't happened. She hasn't even attempted to do that. So therefore they're not admissible, because we haven't had a preponderance of the evidence showing.

25RP 6. Defense counsel also cited Acosta and Lucas as authority to restrict the State from bringing in evidence of Hamilton's assault records. 25RP 11, 17. The State expressed its intent to "use the prior assaultive incidents or allegations" as "it has to do with Dr. Grassian's opinions." 25RP 18-19. The trial court indicated that to admit the prior assaultive incidents, it would need to "look[] at whether, in fact, [Grassian] relied on this incident in making his diagnosis. And even if he did . . . . I would need . . . to find, [1] that it would be relevant, and [2] I would need to do a balancing test." 25RP 19.

Rather than specifically ask Grassian about the assaults, the prosecutor proceeded by attempting to impeach Grassian with prison medical records. Defense counsel did not initially object on any grounds to the State's use of the prior records to impeach Grassian, but lodged additional objections that the prosecutor was merely reading the records into evidence without asking questions. 25RP 89-90; see also 25RP 115, 118-19, 122, 129, 131-32, 157 (additional objections by defense counsel and

admonitions by the trial court regarding prosecutor's failure to ask questions).

When the prosecutor stated, "And they also talked about how to manipulate the doctor in the morning and stated: [']We're going to tie up these suicide rooms, we'll fuck them,[']" defense counsel objected on the basis of hearsay, stating "the comments that are within the notes are attributed to other people that we're not allowed to cross-examine. I would ask the Court to give a limiting instruction that those statements are not actually being offered for the truth of the matter, but rather simply for his diagnosis . . . ." 25RP 103-04. Defense counsel also stated, "I just want to point out what [the prosecutor is] referring to is a doctor quoting a [Custody Unit Supervisor] quoting Mr. Hamilton. So it's a double hearsay. It's not admissible, Your Honor." 25RP 105.

Toward the end of cross examination, the trial court gave Hamilton himself an opportunity to object, and he did so based on hearsay and improper impeachment:

> I just want to address this court and saw that I don't know what defense counsel is up to. I don't know if this is trial strategy. But the prosecutor is admitting double hearsay.
>
> In order for double hearsay to be admissible, both pieces of hearsay has to fall under the exception, and there's just one. And so you're telling this jury that this can be asserted for the truth of statements that I made. What statements did I make? These guys -- this doctor is saying

> what someone else heard. It's triple hearsay at this point. And they're not being instructed . . . .
>
> Then when [the prosecutor is] asking these things to Dr. Grassian, she's testifying. She's doing everything that she can to relate inadmissible facts and data to that jury, and that's exactly what State [v.] Martinez and Anderson talk about. You can't use [Evidence] Rule 705 as a bootstrap to relate inadmissible facts and data to this jury. It's just not right.

25RP 160-61. The trial court expressed concern about Hamilton's double hearsay objection, but appeared satisfied with the State's explanation: "But they're medical records. And medical records are yet another exception to the hearsay rule." 25RP 164.

Hamilton shortly thereafter lodged another objection that implicated ER 404(b) concerns:

> When those jurors are sitting there, hearing her recite that I lied . . . what do you think is going through their minds? Do you think they're thinking about what he said in his report, or are they questioning me as to my version of facts that took place up on that stand?

25RP 166. Hamilton also asked the trial court to perform ER 403 balancing: "I'm just saying anything [the prosecutor] admits, you're still supposed to use ER 403 to determine . . . their misleading effect upon this jury. And that's exactly what's taking place here." 25RP 167.

ii. The various objections to Grassian's testimony made by counsel and Hamilton adequately preserved the errors for review

With regard to the improper impeachment claim, Hamilton himself preserved the claim of error by stating that the prosecutor was relating inadmissible facts to the jury. 25RP 160-61. In addition, Hamilton argued the prosecutor was not permitted to use ER 705 as a "bootstrap" to relate inadmissible facts and data through the cross examination of his expert. 25RP 161. These objections clearly challenged the prosecutor's use of prison records containing Hamilton's misconduct and statements to impeach Grassian. This issue was adequately preserved.

Hamilton's challenge to the admission of statements in the prison records on the basis of hearsay was likewise preserved for appeal. Defense counsel expressly objected on the basis of hearsay to the prosecutor's recitation of records of Hamilton's alleged statements. 25RP 103-05, 165. Hamilton also objected on the basis of hearsay when the trial court gave him the opportunity. 25RP 160.

As for the trial court's erroneous instruction that jurors could consider Hamilton's statements related in the records as substantive evidence, Hamilton specifically challenged the instruction. He stated, "And so you're telling this jury that this can be asserted for the truth of statements that I made. What statements did I make? These guys -- this doctor is

saying what someone else heard. It's triple hearsay at this point. And they're not being instructed . . . ." 25RP 160. This objection clearly indicated Hamilton's disagreement with the trial court allowing the jury to consider statements attributed to Hamilton in the prison records for the truth of the matter asserted. This issue was therefore preserved.

Lastly, although it was directed specifically at the assault records, defense counsel did attempt to prohibit the prosecutor from cross-examining Grassian regarding Hamilton's prior misdeeds while incarcerated. 25RP 18-19. The trial court acknowledged the defense objection and correctly stated that to admit evidence of "prior assaultive incidents" it would need to determine whether Grassian relied on the incidents and perform a balancing test on the records. 25RP 19. Moreover, defense counsel had moved in limine before trial to exclude any of Hamilton's "prior prison/jail misconduct" under ER 401, ER 403, and ER 404(b). CP 215-17. The trial court granted this motion and told the prosecutor, "But if you think that you need to go into any cross examination or some other fashion, please bring it up outside the presence of the jury so I have a better idea of what specifically we're discussing." 16RP 33. The prosecutor never heeded this directive and began introducing Hamilton's prior prison and jail misconduct shortly into her cross examination of Grassian. 23RP 162. Hamilton also objected citing ER 404(b) concerns and asked the trial court to weigh the admission of the

records' statements under ER 403. 25RP 166-67. The pretrial motion in limine as well as defense counsel's and Hamilton's objections regarding the prosecutor introducing prison incidents adequately preserved Hamilton's ER 404(b) objection for this court's review.

iii. If defense counsel failed to adequately object to the prosecutor's improper impeachment of Grassian, which consisted of hearsay and ER 404(b) evidence, they were ineffective

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants reasonably effective representation by counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish an ineffective assistance of counsel claim, counsel's performance must have been deficient and the deficient performance must have resulted in prejudice. Id.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). If counsel's conduct demonstrates a legitimate trial strategy or tactic, it cannot serve as a basis for an ineffective assistance of counsel claim. Strickland, 466 U.S. at 689; State v. Yarbrough, 151 Wn. App. 66, 89, 210 P.3d 1029 (2009).

To the extent defense counsel failed to challenge or object to (1) the State's presentation of improper impeachment evidence, (2) the State's presentation of inadmissible hearsay, (3) the trial court's instruction that jurors could consider prison record statements attributed to Hamilton for the truth of the matter asserted, and (4) the State's presentation of evidence inadmissible under ER 404(b) and ER 403, counsel's performance fell below an objective standard of reasonableness.

No objectively reasonable attorney would fail to object to the introduction of inadmissible and extremely prejudicial evidence at trial that directly undermined the sole defense of diminished capacity. No tactical or strategic reason can explain such a failure. Where a failure to object is unjustified on grounds of trial tactics, it constitutes deficient performance. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (holding failure to object to introduction of defendant's prior drug convictions no tactical decision but deficient performance); State v. Klinger, 96 Wn. App. 619, 623, 980 P.2d 282 (1999) (holding no strategic reason for not moving to suppress marijuana found in a storage shed behind defendant's cabin; counsel's lapse constituted deficient performance); State v. C.D.W., 76 Wn. App. 761, 764, 887 P.2d 911 (1995) (holding failure to object to admission of defendant's confession was inexcusable omission rather than legitimate strategy, and resulted in deficient performance).

Because there was no legitimate reason for defense counsel's failure to object to each and every instance of improper and inadmissible impeachment, hearsay, and propensity evidence, defense counsel's performance fell well below an objective standard of reasonableness. This is especially true in this case where defense counsel pointed the trial court to cases that prohibited the State from introducing Hamilton's prior assaultive conduct but failed to recognize those same cases would similarly exclude the State's introduction of the prison records' contents. To the extent counsel failed to adequately object, Hamilton did not receive constitutionally effective assistance of counsel.

f. The erroneous admission of the providers' statements and related ineffective assistance of counsel severely undermined Hamilton's diminished capacity defense, and was therefore extremely prejudicial

An evidentiary error not of constitutional magnitude requires reversal if the error, within reasonable probability, materially affected the outcome. State v. Stenson, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). As for ineffective assistance of counsel, prejudice is proved when the accused shows a "reasonable probability" that counsel's deficient performance prejudiced the outcome of the case. Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine

confidence in the outcome of trial. Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226.

Hamilton's only defense at trial was diminished capacity. To support this defense, Hamilton testified, providing his version of the events immediately before Trout's alleged assault. Hamilton said he "g[o]t this eerie feeling" he was about to be attacked. 24RP 130. Based on this feeling, he "turned back and r[a]n." 24RP 130. As he was running, he perceived the presence of another inmate, a white supremacist, James Curtis, and he perceived Curtis had a knife. 24RP 128-31. Hamilton did not have a "set plan" but just felt the instinct to run towards the door for his own safety because he thought he was going to be stabbed. 24RP 133. Hamilton stated he heard the inmate say something like, "'I'm going to get him out now,"' which Hamilton took to mean he "was going to be stabbed." 24RP 133. Hamilton said he recalled running and then colliding with Curtis, but then his mind went blank. 24RP 131-32. He had no memory of assaulting Trout.

Hamilton also described experiencing hallucinations, which he stated had occurred three times. 24RP 160. He described "the voice of God telling me I needed to be punished." 24RP 160. On all three occasions, Hamilton engaged in self harm behaviors, cutting himself, attempting to hang himself, or overdosing on medication. 24RP 160.

Hamilton primarily presented his diminished capacity defense through his expert, Dr. Grassian, who testified at length about the mental health issues Hamilton suffered as a result of spending significant periods of time in solitary confinement. 23RP 57, 64-66, 68-69, 76-77, 89-90, 94-99, 105-06. Grassian, based on Hamilton's history of mental illness, concluded,

> And tying that all in with what we know about him, especially the fact that unbeknownst to him -- I mean, he described all of these episodes of dissociative disorder, you know, he'd have these dissociative states. And his description of what happened that day is so strong . . . as a description of a dissociative episode. It makes perfect sense, it's perfectly consistent with what I know as a psychiatrist.
>
> The alternative, that he actually intended to do harm to a corrections officer just really doesn't make a lot of sense psychologically.

23RP 105-06.

Given Hamilton's and Grassian's testimony, the State's improper use of the conclusions of nontestifying witnesses to "impeach" Grassian was particularly prejudicial. Whether Hamilton formed the intent to assault was the central issue in this case. As our supreme court held in Sherman, "Since the central issues in the case dealt with the cause and extent of the worsening of Sherman's condition, we find that the trial court's decision allowing respondents to introduce as evidence the hearsay conclusions of non-testifying experts was prejudicial and therefore constitutes reversible error." 106 Wn.2d at 690. The same is true in this case.

In addition, this case really came down to a credibility contest between Grassian and Hamilton and the State's experts. The State's introduction of a substantial amount of the conclusions in the records improperly contradicted Grassian's opinion and Hamilton's testimony, which Hamilton was unable to challenge through cross examination. Moreover, as discussed, many of the records described Hamilton's prior alleged bad acts, including statements that he had feigned mental health issues before. "The jury's possibly negative assessment of [Grassian's and Hamilton's] credibility—arising from the admission of prior [bad act evidence]—conceivably and negatively influenced the weight they gave to [Grassian's and Hamilton's] testimony, and [Hamilton]'s key witness for his only viable defense of diminished capacity." Lucas, 167 Wn. App. at 112. As in Lucas, this court should "hold the error was not harmless and reverse and remand for further proceedings." Id.

Furthermore, the prosecutor made the most of her improper impeachment of Grassian. During Grassian's testimony, the State asserted it was "entitled to impeach [Grassian's opinion] with the facts that he reviewed, that he considered, or should have considered when making his statements and opinions." 25RP 165. These assertions were echoed during the State's closing argument. See, e.g., 28RP 114-15 ("So if someone like Dr. Grassian is what you get when you are willing to pay $360 an hour, you

get someone who has an end goal in mind and decides which facts they are going to rely on, what they are going to do to support that goal."); 28RP 116 (after asserting, "originally Dr. Grassian testified on direct that there was just no evidence to support all these claims of malingering in his chart. And all these people who said this are simply not qualified because they don't have my level of qualifications," proceeding to list various evidence of malingering State introduced during cross examination); 28RP 117 ("I would submit that the evidence is clear that no weight should be given to [Grassian's testimony]. It's clearly bias[]ed. He clearly did not consider these things or didn't want to."); 28RP 166 ("There is nothing about Dr. Grassian's findings that makes any sense in the context of the actual evidence. He may be the only psychiatrist that testified, but you heard time after time after time in those records when a psychiatrist, a medical doctor said this man is malingering. He is making this stuff up in order to gain something, some sort of personal gain or to get out of something.").

These examples demonstrate the State's extremely prejudicial all out attack on Grassian's opinion was based almost entirely on evidence it improperly introduced during Grassian's cross examination. These arguments show the State believed—correctly—its improper impeachment of Grassian would materially affect the outcome of trial.

The improper impeachment evidence was hearsay, was not properly limited to the purposes of opinion, and contained large quantities of damaging propensity evidence. The admission of this evidence, caused in part by defense counsel's failure to object to every instance of it, affected the outcome of trial within a reasonable probability. This court must accordingly reverse.

4. PROSECUTORIAL MISCONDUCT DEPRIVED HAMILTON OF A FAIR TRIAL

a. The prosecutor impermissibly commented on Hamilton's and Dr. Grassian's veracity during cross examination

Prosecutors are prohibited from giving a personal opinion on the credibility of witnesses. State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). Prosecutors are quasi judicial officers with an independent duty to ensure a fair trial to the defendant, and may not lay aside impartiality to become a heated partisan. State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). Comments on a witness's veracity require reversal where they are "incapable of cure by an objection and an appropriate instruction to the jury." State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995).

During her cross examination of Hamilton, the prosecutor asked about a prison medical record, which in her view, showed Hamilton had faked mental health problems: "And, in fact, you also told him that you made up your symptoms of mental illness because you thought it might help

you originally at your trial." 25RP 36. The prosecutor read a portion of this record for the jury: "When I asked him if it worked out all right, Hamilton said, yes, it did help him. He thought since that worked well, he would keep it going in prison." 25RP 36. In response, Hamilton disputed the accuracy of the record, noting that he had not gone to trial with regard to the case referenced in the records and that he was merely trying to avoid being involuntarily medicated at Western State Hospital. 25RP 36. The prosecutor then stated, "They didn't say you actually went to trial. They said when you went to Western, when you made up that stuff, you thought it would help you at trial. *Kind of like what we're doing here*." 25RP 36 (emphasis added).

During recross examination, the prosecutor asked Hamilton additional questions about the attack. 25RP 81-82. Hamilton said he might have tried to evade the person he perceived was going to attack him by exiting through a nearby door. 25RP 82. The prosecutor pointed out there was another door through which he could have exited upstairs. 25RP 82. Then Hamilton stated, "I know. It don't make sense. That's what happens when --" at which point the prosecutor interrupted him and stated, "Your claim doesn't make sense." 25RP 82.

These were ill intentioned and flagrant comments on Hamilton's veracity. The first comment expressed the prosecutor's opinion that

Hamilton was currently "making up" things to assist him at trial just like he had "made up" mental health symptoms in the past. This was nothing short of calling Hamilton a liar. It directly told jurors Hamilton was faking his diminished capacity defense and they should not believe him. As for the second comment, the prosecutor gave her opinion that Hamilton's rendition of events made no sense. Like the previous statement, this expressed to jurors the prosecutor's personal opinion that Hamilton's story was false and that jurors should not believe it.

While defense counsel objected to both statements and the trial court struck them, 25RP 36, 83, the prosecutor's comments on Hamilton's veracity were so egregious that they were incapable of being cured by the trial court's instruction.

Hamilton's sole defense was that he lacked the capacity to form the intent to assault Trout based on auditory and visual hallucinations related to his serious mental health issues. He specifically testified that right before the alleged assault, he had an eerie feeling that he was about to be attacked. 24RP 130. As he turned around, he reported seeing an object that he thought was a knife wielded by another inmate. 24RP 130-31. Hamilton thought he was going to get stabbed. 24RP 134. He ran and attacked without forming a plan, not realizing that the person he was attacking was Trout. 24RP 132-33. After the incident, Hamilton said he believed Trout was injured because

Trout had involved himself in a knife attack between him and another inmate. 24RP 131-32.

Grassian testified Hamilton's version of events was consistent with someone experiencing dissociative states and that such hallucinations were common for someone with Hamilton's history of solitary confinement. 23RP 76-80, 105-06, 108-14. Grassian stated Hamilton was in a dissociative state at the time of the assault and that Hamilton was unable to form the requisite intent: "in dissociative disorders, there's a sort of a blindness, there's tunnel vision. What he saw was there was an inmate about to attack him, and he had to defend himself. There's no possibility to forming some other intent." 23RP 115. Grassian also confirmed Hamilton would not "have had the capacity to understand or to know the potential for injury he was going to cause to Officer Trout." 23RP 115.

The prosecutor's improper comments went directly to the diminished capacity defense, which was the sole issue at trial. By telling jurors Hamilton was just faking his symptoms, the prosecutor intended to and did express her personal opinion that Hamilton and Grassian were dishonest. Moreover, the prosecutor's statement that Hamilton's claim did not make sense was meant to further diminish Hamilton's defense and Grassian's support of it. The prosecutor further capitalized on its misconduct during closing argument, stating "there is no other solid evidence of an actual

hallucinations [sic] that was not made up by the defendant." 28RP 114. Given the centrality of the diminished capacity defense to the outcome of the case, the prosecutor's calculated remarks on Hamilton's and Grassian's veracity were so egregious that the trial court's instruction failed to cure them. This flagrant and ill intentioned misconduct requires reversal.

b. The prosecutor's disparagement of Dr. Grassian, Hamilton, and defense counsel during closing argument was flagrant and ill intentioned misconduct

A prosecutor is not permitted to impugn the role or integrity of defense counsel. State v. Lindsay, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). "Prosecutorial statements that malign defense counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible." Id. at 432 (citing Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983) (per curiam)).

The Washington Supreme Court has found improper disparagement of the defense where the prosecutor characterized defense counsel's arguments as "sleight of hand" and "bogus." State v. Thorgerson, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011). These arguments were ill intentioned because they were planned out ahead of time and implied deception. Id. Similarly, our supreme court determined the prosecutor's argument was improper when he described the defense argument as a "'classic example of taking these facts and completely twisting them to their

own benefit, and hoping that you are not smart to figure out what in fact they are doing.'" State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008) (quoting verbatim report of proceedings).

The prosecutor's various comments regarding Dr. Grassian were in the same vein as those disapproved in Thorgenson and Warren and accordingly require reversal. The prosecutor argued, "Dr. Grassian is an advocate for prisoners. He is approached by prisoners to help them. He makes a lot of money suing DOC. He has an agenda and he gets paid a lot of money to come and say what Mr. Hamilton wants him to say." 28RP 114. The prosecutor also stated, "So if someone like Dr. Grassian is what you get when you are willing to pay $360 an hour, you get someone who has an end goal in mind and decides which facts they are going to rely on, what they are going to do to support that goal." 28RP 114-15.

With regard to Hamilton, the prosecutor stated, "He is an intelligent guy, capable of coming up with schemes to get out of things or . . . to get what he want[s]." 28RP 119. The prosecutor also argued, with regard to Hamilton's hallucinations at the time of the alleged assault Trout, "He's trying to explain it, he's trying to explain it away, which is what he has done before. He goes back to his old standby, I was hallucinating, his old standby." 28RP 124.

During its rebuttal, the State asserted Hamilton's "actions are clear. His actions speak louder than any expert paid $360 an hour, who has already made up his mind, his actions that Dr. Grassian chooses to disregard." 28RP 175. At the very end of the argument the prosecutor urged jurors,

> You don't get lost in the details. You do not follow this rabbit hole that Mr. Hamilton has asked you to go down, and that's exactly what it is, don't consider the facts, feel sorry for him, I have been in solitary confinement, he hadn't been there for about three years, except for when he left [Twin Rivers Unit], he was there for about thirty days, and then back to [Special Offender Unit].

28RP 177.

The prosecutor's arguments that likened Hamilton's diminished capacity defense to a "rabbit hole," "schemes to get what he wants," and "hallucination, his old standby" were the equivalent of calling defense arguments "sleight of hand," "bogus," and "twisting" the facts. Cf. Thorgerson, 172 Wn.2d at 451-52; Warren, 165 Wn.2d at 29. Likewise, the prosecutor's statements that Hamilton's expert was merely a high paid advocate for prisoners with an "end goal in mind," expressly informed jurors that Hamilton's defense was deceitful and based on an improper agenda. Moreover, the prosecutor's focus on Grassian "get[ting] paid a lot of money" was akin to the misconduct identified in State v. Reed, 102 Wn.2d at 147, where the prosecutor highlighted that defense experts were "outsiders, and

that they drove expensive cars." "Each of these statements was calculated to align the jury with the prosecutor and against" Hamilton. Id.

The prosecutor's arguments expressed to jurors that the defense was using trickery, deception, and unfair tactics to fool the jury into an acquittal. This choice to malign the defense went directly to the sole defense—whether Hamilton formed the prerequisite intent to assault. Hamilton put on extensive testimony regarding his psychiatric diagnoses, hallucinations, and the effects of extended periods of solitary confinement, constituting a plausible theory he did not, at the time he committed the act, intend to assault Trout. Thus, disparagement expressing dishonesty geared at Hamilton's defense constituted ill intentioned and flagrant misconduct.

By failing to object to any of these instances of disparagement, defense counsel provided constitutionally inadequate assistance of counsel. See State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980) (failing to preserve error may constitute ineffective assistance and justifies examining error on appeal). No objectively reasonable defense attorney would fail to object to a prosecutor's repeated assertions that the sole defense theory was based on deception.

Prejudice from deficient performance requires reversal whenever the error undermines confidence in the outcome. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). That confidence is undermined here. Again,

the prosecutor's disparagement was directed at Hamilton's diminished capacity defense, which was the only issue at trial. By attributing deceptive tactics to Hamilton, there is a substantial likelihood, if not a certain one, that the prosecutor's comments affected the verdict.

c. The cumulative effect of the prosecutorial misconduct requires reversal

Once it is established that a prosecutor's conduct was improper, on review, the court considers the likely effect and whether an instruction could have cured it. State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). "'[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.'" Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012) (alteration in original) (quoting State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011)). Even absent an objection, reversal is still required where the misconduct is so flagrant and ill intentioned that a curative instruction would have been useless to obviate the prejudice. Glasmann, 175 Wn.2d at 704.

Here, the prosecution repeatedly expressed its disbelief at Hamilton's hallucinations and directly accused Hamilton of feigning them. The prosecutor also stated Hamilton's claim did not make sense. During closing, the State disparaged Hamilton by again repeatedly accusing him of faking

symptoms to obtain an acquittal. The State's disparagement of Grassian as a wealthy advocate for prisoners with a set agenda further cast an aura of deception on the defense. The State's comments on veracity and closing argument were incurable by an instruction because they were designed to tell jurors that Hamilton's defense team was lying about his diminished capacity and inability to form intent. The prosecutorial misconduct had that very impact regardless of the curative instructions given about the veracity comments and regardless of any attempted curative instruction regarding closing argument. The prosecutor's misconduct deprived Hamilton of a fair trial.

5. THE JURY INSTRUCTION ON REASONABLE DOUBT IS UNCONSTITUTIONAL

Hamilton's jury was instructed, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 52; 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008) (WPIC). The Washington Supreme Court requires that trial courts provide this instruction in every criminal case, at least "until a better instruction is approved." State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007).

However, WPIC 4.01 is constitutionally defective. It instructs jurors they must be able to articulate a reason for having a reasonable doubt. This

engrafts an additional requirement on reasonable doubt. Jurors must have more than just a reasonable doubt; they must also have an articulable doubt. This makes it more difficult for jurors to acquit and easier for the prosecution to obtain convictions. In addition, telling jurors a reason must exist for reasonable doubt undermines the presumption of innocence and is effectively identical to the fill-in-the-blank arguments that Washington courts have invalidated in prosecutorial misconduct cases. If fill-in-the-blank arguments impermissibly shift the burden of proof, so does an instruction requiring the exact same thing. Instructing jurors with WPIC 4.01 is constitutional error.

a. WPIC 4.01's language improperly adds an articulation requirement

Having a "reasonable doubt" is not, as a matter of plain English, the same as having a reason to doubt. But WPIC 4.01 requires both for a jury to return a not guilty verdict. A basic examination of the meaning of the words "reasonable" and "a reason" reveals this grave flaw in WPIC 4.01.

"Reasonable" is defined as "being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment . . ." WEBSTER'S THIRD NEW INT'L DICTIONARY 1892 (1993). For a doubt to be reasonable

under these definitions it must be rational, logically derived, and have no conflict with reason. Accord Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is one based upon 'reason.'"); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'" (quoting United States v. Johnson, 343 F.2d 5, 6 n.1 (2d Cir. 1965))).

The placement of the article "a" before "reason" in WPIC 4.01 inappropriately alters and augments the definition of reasonable doubt. "[A] reason" in the context of WPIC 4.01, means "an expression or statement offered as an explanation or a belief or assertion or as a justification." WEBSTER'S, supra, at 1891. In contrast to definitions employing the term "reason" in a manner that refers to a doubt based on reason or logic, WPIC 4.01's use of the words "a reason" indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable, reasonable doubt.

Due process "protects the accused against conviction upon proof beyond a reasonable doubt." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). But, in order for the jury to acquit under

WPIC 4.01, reasonable doubt is not enough. Instead, Washington courts instruct jurors that they must also be able to point to a reason that justifies or explains their reasonable doubt. A juror might have reasonable doubt but also have difficulty articulating or explaining the reason for that doubt. A case might present such voluminous and contradictory evidence that jurors having legitimate reasonable doubt would struggle putting it into words or point to a specific, discrete reason for it. Yet, despite reasonable doubt, acquittal would not be an option.

Scholarship on the reasonable doubt standard elucidates similar concerns with requiring jurors articulate their reasonable doubt:

> An inherent difficulty with an articulability requirement of doubt is that it lends itself to reduction without end. If the juror is expected to explain the basis for doubt, that explanation gives rise to its own need for justification. If a juror's doubt is merely, 'I didn't think the state's witness was credible,' the juror might be expected to then say why the witness was not credible. The requirement for reasons can all too easily become a requirement for reasons for reasons, ad infinitum.
>
> One can also see a potential for creating a barrier to acquit for less-educated or skillful jurors. A juror who lacks the rhetorical skill to communicate reasons for a doubt is then, as a matter of law, barred from acting on that doubt. This bar is more than a basis for other jurors to reject the first juror's doubt. It is a basis for them to attempt to convince that juror that the doubt is not a legal basis to vote for acquittal.
>
> A troubling conclusion that arises from the difficulties of the requirement of articulability is that it hinders the juror who has a doubt based on the belief that the

> totality of the evidence is insufficient. Such a doubt lacks the specificity implied in an obligation to 'give a reason,' and obligation that appears focused on the details of the arguments. Yet this is precisely the circumstance in which the rhetoric of the law, particularly the presumption of innocence and the state burden of proof, require acquittal.

Steve Sheppard, The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003) (footnotes omitted). In these various scenarios, despite having reasonable doubt, jurors could not vote to acquit in light of WPIC 4.01's direction to articulate a reasonable doubt. By requiring more than a reasonable doubt to acquit a criminal defendant, WPIC 4.01 violates the federal and state due process clauses. Winship, 297 U.S. at 364; U.S. CONST. amends. V, XIV; CONST. art. I, § 3.

b. WPIC 4.01's articulation requirement impermissibly undermines the presumption of innocence

"The presumption of innocence is the bedrock upon which the criminal justice system stands." Bennett, 161 Wn.2d at 315. It "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." Id. at 316. To avoid this, Washington courts have strenuously protected the presumption of innocence by rejecting an articulation requirement in different contexts. This court should safeguard the presumption of innocence in this case.

In the context of prosecutorial misconduct, courts have prohibited arguments that jurors must articulate a reason for having reasonable doubt. A fill-in-the-blank argument "improperly implies that the jury must be able to articulate its reasonable doubt." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Therefore, such arguments are flatly barred "because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence." Id. at 759-60.

For instance, in State v. Walker, the court held improper a prosecutor's PowerPoint slide that read, "'If you were to find the defendant not guilt, you *have* to say: "I had a reasonable doubt[.]" What was the reason for your doubt? 'My reason was ___.'"" 164 Wn. App. 724, 731, 265 P.3d 191 (2011) (quoting clerk's papers). Likewise, in State v. Venegas, the court found flagrant and ill-intentioned misconduct where the prosecutor argued in closing, "'I order to find the defendant not guilty, you have to say to yourselves: "I doubt the defendant is guilty, and my reason is"—blank.'" 155 Wn. App. 507, 523-24 & n.16, 228 P.3d 813 (2010) (quoting report of proceedings).

In State v. Anderson, 153 Wn. App. 417, 424, 220 P.3d 1273 (2009), moreover, the prosecutor made a fill-in-the-blank argument based on his or her reading of WPIC 4.01: "A reasonable doubt is one for which a reason exists. That means, in order to find the defendant not guilty, you have to say

'I don't believe the defendant is guilty because,' and then you have to fill in the blank." The same occurred in State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010), where the prosecutor told jurors,

> What [WPIC 4.01] says is 'a doubt for which a reason exists.' In order to find the defendant not guilty, you have to say, 'I doubt the defendant is guilty and my reason is . . . .' To be able to find a reason to doubt, you have to fill in the blank; that's your job.

These prosecutorial misconduct cases demonstrate the fatal defect in WPIC 4.01. WPIC 4.01's language itself has invited prosecutors to argue that jurors must be able to articulate a reason to doubt.

Although it does not explicitly tell jurors to fill in a blank, WPIC 4.01 indicates that jurors need to do just that. Trial courts instruct jurors that a reason must exist for their reasonable doubt. This is, in substance, the same mental exercise as telling jurors they must fill in a blank with an explanation or justification in order to acquit. If telling jurors they must articulate a reason for reasonable doubt is prosecutorial misconduct because it undermines the presumption of innocence, it makes no sense to allow the exact same undermining to occur through a jury instruction.

Outside of prosecutorial misconduct case law, Division Two recently acknowledged that an articulation requirement in a trial court's preliminary instruction on reasonable doubt would be have been error had the issue been preserved. State v. Kalebaugh, 179 Wn. App. 414, 421-23, 318 P.3d 288,

review granted, 180 Wn.2d 1013, 327 P.3d 54 (2014). The court determined Kalebaugh could not demonstrate actual prejudice given that the trial court instructed the jury with WPIC 4.01 at the end of trial. Id. at 422-23. The court therefore concluded the error was not manifest under RAP 2.5(a). Id. at 424.

In sidestepping the issue before it on procedural grounds, the Kalebaugh court pointed to WPIC 4.01's language with approval. 179 Wn. App. at 422-23. Similarly, in considering a challenge to fill-in-the-blank argument, the Emery court approved of defining "reasonable doubt as a 'doubt for which a reason exists.'" 174 Wn.2d at 760. But neither Emery nor Kalebaugh gave any explanation or analysis regarding why an articulation requirement is unconstitutional in one context but not unconstitutional in all contexts.[10] Furthermore, neither court was considering a direct challenge to the WPIC 4.01 language, so their approval of WPIC 4.01's language does not control. See In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("[Courts] do not rely on cases that fail to specifically raise or decide an issue.").

[10] The Kalebaugh court stated it "simply [could not] draw clean parallels between cases involving a prosecutor's fill-in-the-blank argument during closing, and a trial court's improper preliminary instruction before the presentation of evidence." 179 Wn. App. at 423. But drawing such "parallels" is a very simple task given that both errors undermine the presumption of innocence by misstating the reasonable doubt standard. As the dissenting judge correctly surmised, "if the requirement of articulability constituted error in the mouth of a deputy prosecutor, it would surely also do so in the mouth of the judge." Id. at 427 (Bjorgen, J., dissenting).

In response, the State might argue that Washington courts have already rejected this issue by approving of WPIC 4.01's language in State v. Tanzymore, 54 Wn.2d 290, 291 n.2, 340 P.2d 178 (1959), State v. Harras, 25 Wash. 416, 421, 65 P. 774 (1901); State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975), and State v. Cosden, 18 Wn. App. 213, 221, 568 P.2d 802 (1977). But these cases were decided long ago and can no longer be squared with Emery and the fill-in-the-blank cases. WPIC 4.01 requires the jury to articulate a reason for its doubt, which "subtly shifts the burden to the defense." Emery, 174 Wn.2d at 760. Because the State will avoid supplying a reason to doubt in its own case, WPIC 4.01 suggests that either the jury or the defense should supply them, "further undermining the presumption of innocence." Kalebaugh, 179 Wn. App. at 426 (Bjorgen, J., dissenting). There, "[t]he logic and policy of the decision in [Emery] impels the conclusion" that the articulation requirement in WPIC 4.01 is "constitutionally flawed." Id. at 424.

By requiring more than just a reasonable doubt to acquit, WPIC impermissibly undercuts the presumption of innocence. WPIC 4.01 is therefore unconstitutional.

c. WPIC 4.01's articulation requirement requires reversal

An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the Sixth Amendment's jury-trial guarantee. Sullivan v. Louisiana, 508 U.S. 275, 279-80, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Indeed, where, as here, the "instructional error consists of a misdescription of the burden of proof, [it] vitiates *all* the jury's findings." Id. at 281. Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as 'structural error.'" Id. at 281-82.

As discussed, WPIC 4.01's language requires more than just a reasonable doubt to acquit criminal defendants; it requires a reasonable articulable doubt. Its articulation requirement undermines the presumption of innocence by shifting the burden to defendants to supply reasons to doubt. Instructing jurors with WPIC 4.01 is structural error and requires reversal.

6. IF THE FOREGOING ERRORS DID NOT INDIVIDUALLY DEPRIVE HAMILTON OF A FAIR TRIAL, THEIR CUMULATIVE EFFECT SURELY DID

Courts reverse a conviction for cumulative error "when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); see also State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 688 (1984) ("While it is possible that some . . . errors, standing alone, might not be of sufficient gravity to constitute

grounds for a new trial, the combined effect of the accumulation of errors most certainly requires a new trial.").

Hamilton's trial abounded with errors, which include multiple examples of extremely egregious government misconduct by both the Snohomish County deputy prosecutor and the DOC, the trial court's refusal to instruct jurors that Hamilton faced a third-strike conviction even despite a venireperson stating he only got a 72-day sentence for the same crime, the introduction of Hamilton's prior bad acts, which constituted inadmissible hearsay and improper ER 404(b) propensity evidence, through the State's unlawful impeachment of Dr. Grassian, and an unconstitutional reasonable doubt instruction. If this court determines that, individually, these errors do not require reversal of Hamilton's conviction, it should conclude that, together, these errors deprived Hamilton of a fair trial. These errors' cumulative effect requires reversal.

7. THE TRIAL COURT VIOLATED HAMILTON'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS WHEN A JUDGE, RATHER THAN A JURY, MADE A FINDING THAT HE WAS A "PERSISTENT OFFENDER" UNDER THE POAA

The trial court violated Hamilton's rights to have a jury determine whether he qualified as a "persistent offender" under RCW 9.94A.030(37)(a)(ii) because that determination required the judge to make factual findings beyond the fact of prior convictions. Because no mechanism

exists for a jury to make such a finding, Hamilton asks this court to remand for sentencing within the standard range.

a. The state and federal constitutions require a jury to find any fact that increases the penalty for a crime beyond the standard range

In Apprendi v. New Jersey, 530 U.S. 466, 476, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the Court held that, pursuant to the Fourteenth Amendment right to due process and the Sixth Amendment right to trial by jury, "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

In Blakely v. Washington, 542 U.S. 296, 313-14, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the Court determined that a sentence above the standard range, imposed based on a judge's finding of deliberate cruelty, violated the Sixth Amendment's jury-trial right. There, the question was whether "the prescribed statutory maximum" for Apprendi purposes was the top of the standard range or the statutory maximum term. The Court determined that the statutory maximum for Apprendi purposes is the maximum sentence a judge may impose without any additional findings. Blakely, 542 U.S. at 303-04.

Both Blakely and Apprendi preserved the rule set forth in Almendarez Torres v. United States, 523 U.S. 224, 244, 118 S. Ct. 1219, 140

L. Ed. 2d 350 (1998), which held the "fact of" a prior conviction need not be pleaded in an indictment or proved to a jury beyond a reasonable doubt. Apprendi, 530 U.S. at 490 (declining to overrule Almendarez Torres but characterizing its holding as a "narrow exception to the general rule"); Blakely, 542 U.S. at 301 (reciting rule and exception as set forth in Apprendi).[11] Washington courts have followed Almendarez Torres, holding that, for the purposes of imposing a life sentence under the POAA, a judge, rather than a jury, may make the required findings on the grounds that such findings fall under the fact-of-prior-conviction exception. E.g., State v. Witherspoon, 180 Wn.2d 875, 892-93, 329 P.3d 888 (2014) (collecting cases and stating, "We have repeatedly held that the right to jury determinations does not extend to the fact of prior convictions for sentencing purposes").

[11] Heavy criticism has been leveled against the Almendarez Torres exception and its continuing vitality is questionable at best. See Apprendi, 530 U.S. at 487, 489-90 (noting "prior conviction" exception was at best "an exceptional departure from" historic sentencing practice, and stating that it is "arguable that Almendarez Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested"); id. at 518-19 (Thomas, J., concurring) (concluding that Almendarez Torres was wrongly decided); Shepard v. United States, 544 U.S. 13, 27-28, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005) (Thomas, J., concurring in part and in the judgment) (observing "a majority of the Court now recognizes that Almendarez Torres was wrongly decided" and asserting "in an appropriate case, this Court should consider Almendarez Torres'[s] continuing viability."); State v. Witherspoon, 171 Wn. App. 271, 306, 286 P.3d 996 (2012) (Quinn-Brintnall, J., dissenting) ("Two recent . . . opinions, Oregon v. Ice, 555 U.S. 160, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009), and Southern Union Co. v. United States, ___ U.S. ___, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012), cast further doubt on the constitutionality of having a trial court rather than a jury, decide whether prior convictions are proven by a preponderance of the evidence as, *historically*, juries made this determination under recidivist statutes like the POAA."), aff'd, 180 Wn.2d 875, 329 P.3d 888 (2014).

But no Washington case has ever addressed whether the temporal relationships between each of the convictions and the underlying offenses fall outside the fact-of-prior-conviction exception. It thus remains an open question. See In re Electric Lightwave, 123 Wn.2d at 541 ("[Courts] do not rely on cases that fail to specifically raise or decide an issue."). Because the POAA's temporal relationship between convictions and offenses consists of factual matters beyond the mere existence of prior convictions, the temporal relationship must be proved to a jury beyond a reasonable doubt.

b. The fact-of-prior-conviction exception is narrow in scope and the findings necessary under RCW 9.94A.030(37)(a)(ii)[12] fall outside of it

Given that no Washington case addresses this issue, this court should rely on persuasive authority from other jurisdictions. In re Pers. Restraint of King, 54 Wn. App. 50, 53, 772 P.2d 421 (1989).

[12] RCW 9.94A.030(37) provides, in pertinent part,

> "Persistent offender" is an offender who:
>
> (a)(i) Has been convicted in this state of any felony considered a most serious offense; and
>
> (ii) Had, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted . . . .

The Court of Appeals for the Ninth Circuit has been "hesitant to broaden the scope of the prior conviction exception to facts not apparent on the face of conviction documents." Butler v. Curry, 528 F.3d 624, 644-45 (9th Cir. 2008) (citing United States v. Kortgaard, 425 F.3d 602, 610 (9th Cir. 2005) (concluding that Almendarez Torres fact-of-prior-conviction exception was "narrow exception to the general rule")). The exception does not extend to "qualitative evaluations of the nature or seriousness of past crimes, because such determinations cannot be made solely by looking to the documents of conviction." Butler, 528 F.3d at 644 (citing Kortgaard, 425 F.3d at 607 (holding that "seriousness" of past crimes and "likelihood of recidivism" are not facts that come within the fact-of-prior-conviction exception); Stokes v. Schriro, 465 F.3d 397, 404 (9th Cir. 2006) (holding the determination whether the present offense is "strikingly similar" to a past offense does not come within the "prior conviction" exception)).

In United States v. Salazar Lopez, 506 F.3d 748 (9th Cir. 2007), the court addressed a conviction under 8 U.S.C. § 1326(b)(1), which raises the maximum term for illegal reentry from two to 10 years if the relevant prior "removal [i]s subsequent to a conviction for commission of . . . a felony." A jury had found Salazar was removed from the United States at some point, but was not required to find the date of that removal. Salazar Lopez, 506 F.3d at 751. The court concluded a district judge could determine whether

there was a prior felony conviction without committing an Apprendi error, but that the timing of the later removal required a jury finding beyond a reasonable doubt. Salazar Lopez, 506 F.3d at 751-52. The court reached this conclusion even though the statutory maximum was based in part on the fact and timing of a prior conviction reflected in conviction documents and even though the date of the later removal was reflected in documents from an immigration court. Id. at 752.

Thus, Salazar Lopez amply demonstrates how a finding as to the relative timing of an event—even despite dates appearing on court documentation—exceed the scope of judicial fact-finding under Blakely and Apprendi. Here, Hamilton's prior conviction documents establish that prior first degree robbery convictions were entered on October 27, 1999 (noting crime occurred "6/30/99"), November 15, 2007 (noting crime occurred "10/25/06"), and November 15, 2007 (noting crime occurred "12/28/06"). Supp. CP ___ (sub no. 229, State's Sentencing Materials). The dates the crimes occurred relative to the dates of conviction are facts that should have been proved to a jury beyond a reasonable doubt.

Indeed, even though a date of criminal conduct may be listed on the judgment and sentence form, there is no indication of how that date was determined or whether it is accurate. For example, where time is not a material element of the charged crime, the language "on or about" in a

charging document is sufficient to permit proof of the act at any time within the statute of limitations, where an alibi defense is not asserted. State v. Hayes, 81 Wn. App. 425, 432, 914 P.2d 788 (1996). To impose the POAA sentence, the finder of fact is required to determine not only the temporal relationship between the convictions and offenses, but also the dates of commission of those offenses.[13] The date listed on the judgment and sentence may or may not coincide with the precise date of the commission of the offense.

While the sentencing judge might have been entitled to find the prior convictions occurred in 1999 and 2007, a jury was required to find the additional facts underlying the temporal relationship between the offenses and convictions beyond a reasonable doubt, e.g., offense→conviction→offense→conviction→offense→conviction. As in Salazar Lopez, the required temporal factual determination reaches beyond Almendarez Torres's narrow fact-of-prior-conviction exception and requires proof to a jury beyond a reasonable doubt.

[13] Cf. State v. Newlum, 142 Wn. App. 730, 742, 176 P.3d 529 (2008) (to impose exceptional sentence under RCW 9.94A.535(2)(c), based on commission of multiple current offenses and high offender score, sentencing court need only find the fact of the defendant's convictions to impose sentence; current offenses are to be treated as "prior convictions" under RCW 9.94A.589 1)(a)).

c. The remedy is remand for sentencing within the standard range

To impose a life sentence, the trial judge had to make factual findings regarding the necessary temporal relationships beyond the mere "fact" of the prior conviction. This is impermissible judicial fact-finding under Blakely and Apprendi, as a jury was required to make these findings beyond a reasonable doubt. Trial court do not have inherent authority to impanel sentencing juries. State v. Pillatos, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007).[14] Accordingly, this court should remand for sentencing within the standard range.

[14] In response to Pillatos, the legislature gave courts "authority to impanel juries to find *aggravating circumstances* in all cases that come before the courts for trial or sentencing . . . ." LAWS OF 2007, ch. 205, § 1 (emphasis added).

> In any case where an *exceptional sentence* above the standard range was imposed and where a new sentencing hearing is required, the superior court *may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3),* that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

Id. § 2 (emphasis added) (codified as amended at RCW 9.94A.537(2)). However, these changes applied only to exceptional sentences. A sentence imposed under the POAA is not an exceptional sentence. State v. Ball, 127 Wn. App. 956, 960, 113 P.3d 520 (2005). Neither is a POAA sentence based on an aggravating factor listed in RCW 9.94A.535(3).

D. CONCLUSION

Hamilton was denied a fair trial and respectfully asks this court, based on the numerous errors he has identified, to remand for a new and fair trial.

DATED this _____ day of July, 2015.

Respectfully submitted,

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